88-1462

Supreme Court, U.S.
FILED
SEP 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF
SCOTT PAPER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether a federal court's power to vacate arbitration awards which do not "draw their essence" from the collective bargaining agreement empowers the court to overturn an arbitral decision on the ground that the court disagrees with the arbitrator's conclusion that the language of a collective bargaining agreement is open to interpretation and with the arbitrator's reliance on extrinsic evidence of the parites' intent in construing that language?

2. If the answer to the first question is "yes," what are the limits of the courts' power to vacate arbitration awards on these grounds?

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UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit in two cases entitled *S.D. Warren Company v. United Paperworkers International Union, Local No. 1069*, C.A. 1, Nos. 86-1450 and 87-1570.

OPINIONS BELOW

The original opinion of the United States Court of Appeals for the First Circuit in this matter (*Warren I*) is reported at 815 F.2d 178, and is reprinted as Appendix C, pp. 13a-32a, to the separately bound Appendix to this petition for a Writ of Certiorari ("Pet. App."). The opinion of the First Circuit upon remand from this

Court (*Warren II*) is reported at 845 F.2d 3, and is reprinted at Pet. App. A, pp. 1a-11a. The third opinion of the Court of Appeals (*Warren III*) is reported at 846 F.2d 827, and is reprinted at Pet. App. F, pp. 108a-22a. The opinion of the United States District Court for the District of Maine reviewed in *Warren I and II* is reported at 632 F. Supp. 463, and is reprinted at Pet. App. D, pp. 32a-48a. The District Court opinion reviewed in *Warren III* is unreported, and is printed at Pet. App. G, pp. 123a-26a. The award of Arbitrator Suzanne Gwiazda, which was the subject of *Warren I* and *Warren II*, is reported at 89 Lab. Arb. (BNA) 688, and is reprinted at Pet. App. E, pp. 39a-107a. The award of arbitrator Theodore Role, which was the subject of *Warren III*, is unreported, and is printed at Pet. App. H, pp. 127a-200a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit in *Warren II* was entered on April 21, 1988. The judgment of the Court of Appeals in *Warren III* was entered on May 19, 1988. On June 25, 1988, Justice Brennan signed an Order extending the time for filing a petition for writ of certiorari in both cases to and including September 18, 1988. (Pet. App. I, p. 201a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect

to the amount in controversy or without regard to the citizenship of the parties.

Section 203(d) of the Labor-Management Relations Act, 29 U.S.C. § 173(d), provides:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.

STATEMENT OF THE CASE

Introduction

Petitioner United Paperworkers International Union, Local 1069 (the "Union") and respondent S.D. Warren Co. (the "Company") were, at all times relevant herein, parties to a collective bargaining agreement covering the production and maintenance employees at the Company's paper mill in Westbrook, Maine. Under that agreement, the Company has the right to discharge employees only for "proper cause." Appended to the agreement, and incorporated therein, is Mill Rule 7 which lists thirteen "causes for discharge," including such offenses as "disorderly conduct," "deliberate waste of Company time," and "Smoking upon Company's premises except in authorized smoking areas."

On February 15, 1984, the Company discharged nine employees on the ground that each employee had possessed, used or sold marijuana or alcohol on Company premises, an offense proscribed by subsection (a) of Mill Rule 7. The Union filed a grievance over each discharge alleging that the Company lacked proper cause for the discharge. Under the auspices of the American Arbitration Association, the parties selected two arbitrators to render final and binding decisions on the Union's grievances: Arbitrator Suzanne Gwiazda was selected to decide the grievances concerning employees Denis, Graham, Willoughby

and Buhelt, and Arbitrator Theodore Role was selected to decide the grievances concerning MacDonald, Anderson, Jensen, Rondeau, and Hudson.

The Arbitrators' Decisions

On September 19, 1985, following an eight-day hearing over a period of four months, and after receiving post-hearing briefs, Arbitrator Gwiazda rendered a 41 page decision and award ("the Gwiazda Award") holding that, in light of all the circumstances, the conduct of three of the four grievants, while violative of Rule 7, provided "proper cause" for lengthy suspensions (ranging from four to nine months) but *not* for discharge. In reaching this conclusion the Arbitrator reasoned as follows.

Arbitrator Gwiazda began by addressing the question of whether, as the Company contended, "once a violation of Mill Rule 7(a) is established, a discharge for violation of that rule must be upheld because of the plain meaning of the contract, past practice, bargaining history, and public policy." Pet. App. 68a. The Arbitrator rejected that contention on several grounds.

First, the Arbitrator looked to the language of the Rule and found that it is *not* "plain." The Arbitrator stated:

> Granted Section 7 of the Mill Rules is titled "Causes for Discharge," but there is no verb used. It does not say whether such causes "*will* be" or "*may* be" grounds for termination. [Pet. App. 76a; emphasis in original.]

The Arbitrator concluded that this ambiguity was "heightened" by the Company's own "Safety Policy handbook" which provided that the violation of certain rules—including Rule 7(a)—"*may* mean immediate discharge"; the Arbitrator noted that "[i]nasmuch as the safety booklet is a unilateral statement of Company policy, not a negotiated agreement with the Union, the Company had full opportunity to state that violations of [Rule

7(a)] *will* mean immediate discharge," but the Company did not do so. Pet. App. 77a (emphasis in original).

In addition to the contract language, Arbitrator Gwiazda looked to the parties' past practice to determine whether the parties intended any violation of Rule 7 to *ipso facto* constitute "proper cause" for discharge. The Arbitrator found that

> the vast majority of Rule 7 violations have been penalized with something less than immediate discharge. To be specific, other than the cases at hand, of the forty-one (41) identifiably Rule 7 violations in the record, only two (2) such violations have been penalized with immediate discharge, and both involved incarceration for serious crimes (manslaughter and incest, according to unrebutted Union testimony). [Pet. App. 78a]

The Arbitrator went on to find that some employees had received "mere verbal warnings" for Rule 7 violations (even for second offenses); "at least eight written warnings have been issued for Rule 7 violations"; "[n]o fewer than eighteen (18) suspensions . . . have been meted out for Rule 7 violations"; and "last-chance EAP [Employee Assistance Program] agreements have been given to at least six (6) employees found to be violating Rule 7 . . . two after apparently violating the rule at issue here—Rule 7(a)." Pet. App. 78a-79a.

Based on all of these considerations, the Arbitrator concluded that she was not precluded from assessing whether the penalty of discharge was "proper" in light of the conduct of the grievants. Arbitrator Gwiazda explained:

> [T]he Agreement does not "clearly" require immediate discharge, and past practice only heightens the ambiguity about what will happen to the employee who violates Mill Rule 7. Nor is there any express restriction in the Agreement limiting the Arbitrator's remedy authority. Under these conditions, it is well established that where an arbitrator is adjudi-

> cating a "proper cause" case, and he or she finds that the discharge penalty was improper because it was arbitrary, capricious, in bad faith, discriminatory, excessively or disparately harsh, or just plain unfair —he or she has the authority to fashion a lesser penalty or direct make-whole remedy as the facts of the case require. [Pet. App. 92a.]
>
> * * * *
>
> Under the proper cause provision, the Company has the right to discipline employees who violate Mill Rules, including the right to discharge where necessary, but the discipline must be reasonably even-handed to be fair or "proper." [Pet. App. 94a.]

After considering all of the surrounding circumstances with respect to the grievances' situation and their dealing with the undercover agent who had participated in the grievants' violations of Mill Rule 7(a), the Arbitrator concluded that the discharges "were excessively harsh in light of past discipliary practice for similarly serious Mill Rule 7 violations." Pet. App. 106a. The Arbitrator left the grievants with "[h]eavy suspensions" ranging from four to nine months to "impress upon the grievants the seriousness of their misconduct," but, persuaded that the grievants "fully realize this now and will return to work with the determination to be productive employees which motivated them in the first place," the Arbitrator overturned the discharges. Pet. App. 106a-107a.

After the Gwiazda Award issued, Arbitrator Role held a six-day hearing with respect to the four discharged employees whose grievances had been submitted to him rather than to Arbitrator Gwiazda. Following further briefing, on June 24, 1986, Arbitrator Role issued a 51 page decision and award to resolve those grievances. He agreed with the construction of the collective bargaining agreement enunciated in the Gwiazda Award. *See* Pet. App. 184a-185a. And like Arbitrator Gwiazda, he found that the grievants' offenses warranted suspensions but not discharges. *See* Pet. App. 198a-199.

The Decision of the Court of Appeals in *Warren I*

Following the issuance of the Gwiazda Award, the Company filed this action seeking to have that Award vacated. The District Court granted summary judgment for the Union, but the United States Court of Appeals for the First Circuit reversed. The appellate court rested its decision on two grounds: first, that "the award cannot be enforced as a matter of public policy," and second that the award "does not draw its essence from the collective bargaining agreement." Pet. App. 30a.

In reaching this latter conclusion, the court of appeals took it upon itself "to see if the contract was ambiguous," Pet. App. 24a, as the court understood the arbitrator's task to be limited to "construe[ing] ambiguous contract language,'" *id.* 20a, *quoting Detroit Coil v. Machinists*, 594 F.2d 575, 579 (6th Cir. 1979), *cert. denied*, 444 U.S. 840. The court below decided, in disagreement with the Arbitrator, that the meaning of the contract is plain: "*We disagree* that Mill Rule 7(a) was so ambiguous that it took away from the employer the exclusive right to determine the punishment to be imposed for violation of that clause." Pet. App. 17a (emphasis added). That court further concluded that the Arbitrator had misconstrued that contract: "[*W*]*e conclude* that the parties at the bargaining table had a meeting of the minds, that in cases of possession, use or sale of marijuana on company property, the employer had a right to discharge." Pet. App. 24a (emphasis added). On that basis the court of appeals decided that Arbitrator Gwiazda's "construction is not the one the parties bargained for" and that therefore the Award "does not draw its essence from the collective bargaining agreement." Pet. App. 30a-31a.

The Union petitioned this Court for a writ of certiorari to enable the Court to review the First Circuit's decision. On December 14, 1987, the Court granted the writ, vacated the judgment, and remanded the case for recon-

sideration in light of this Court's intervening decision in *Paperworkers v. Misco*, —— U.S. ——, 56 L.W. 4011 (December 1, 1987). *See* Pet. App. 12a.

The Decision of the Court of Appeals in *Warren II*

On remand, the First Circuit reaffirmed its decision in *Warren I*. The court of appeals grudgingly "assume[d] without deciding that *Misco* forecloses the alternate public policy grounds upon which we decided *Warren I*." Pet. App. 8a. But that court asserted that "*Misco* does not affect [the] basic holding" of the first decision. Pet. App. 2a.

In reaching this conclusion, the court below once again relied upon its own "uncomplicated reading" of the "plain language of the contract" to decide that the agreement "removes from the arbitrator the authority to determine a remedy once she concludes that a certain rule has been breached." Pet. App. 10a. That court justified that interpretation by constructing its own accommodation of the disparate terms of the contract:

> The parties negotiated and agreed to the remedy for violations of Rule 7(a). . . . The Rule plainly states that such a violation is "cause for discharge." The management rights clause provides that the Company "reserves the sole right to . . . discharge employees for proper cause. . . ." The Arbitrator, himself, agreed "that arbitrators generally consider synonymous the language 'proper cause,' 'just cause,' or 'cause . . . .'" [1] Therefore, the contract plainly states that the Company has the sole right to discharge employees for the violation which admittedly occurred. [Pet. App. 10a-11a.]

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[1] The foregoing sentence is clearly in error, since no such passage appears in Arbitrator Gwiazda's award. Evidently the court had in mind a passage from Arbitrator Role's award, Pet. App. 185a, which was then under review by a different panel of the court of appeals, as discussed *infra* at 9-10. *See also Warren III*, Pet. App. 120a-121a n.6 (Coffin, C.J., concurring.)

The court of appeals added:

> In the face of the contract's unambiguous language to this effect, it cannot be said that the arbitrator even "arguably constru[ed] or appl[ied] the contract." [Pet. App. 11a, *quoting*, *Misco*, 56 L.W. at 4014.]

The Decision of the Court of Appeals in *Warren III*

While *Warren I* had been pending in the court of appeals, the Company had filed a separate action seeking to have arbitrator Role's Award vacated. Once *Warren I* was decided, the district court ruled for the Company in this second action and the Union appealed.

Following the decision in *Warren II*, a separate (but overlapping) panel of the First Circuit affirmed the district court's order vacating the Role Award. That panel based its decision on *Warren I* and *Warren II*, reasoning that "[g]iven th[e] holding in the companion case, the arbitrator's findings of Rule 7(a) violations . . . bind the Union here as well." Pet. App. 111a.

Chief Judge Coffin concurred in the judgment "because the panel opinion in the companion case . . . has become the law in this circuit and therefore controls the instant case." *Id.* 112a. But in a separate opinion he argued that *Warren I* and *II* were wrongly decided and that this Court's decision in *Misco* "requires that we affirm, rather than vacate, the arbitration awards." *Id.* Chief Judge Coffin explained:

> [G]iven the arguable ambiguity in the contract concerning the Company's right to immediately discharge employees under Mill Rule 7, the Company's past practices and other considerations specific to the plant, the arbitrators . . . *arguably* could have decided that the employees' violations of that rule were neither "causes" nor "proper causes" for discharge. I would conclude that, in both cases, the arbitrator was "arguably construing or applying the contract and acting within the scope of his authority. . . ."

> Therefore, the fact that we might be "convinced he committed serious error does not suffice to overturn his decision. . . ." [Pet. App. 122a, citations omitted; emphasis in original]

REASONS FOR GRANTING WRIT

The decisions below hold that where a collective bargaining agreement requires "cause" for discharge and also defines "dischargeable" conduct, arbitrators are *required* to interpret the agreement as granting the employer an unfettered and unreviewable discretion to decide whether to discharge an employee committing a "dischargeable offense." That proposition has generated a square and irreconcilable 4 circuit to 3 circuit conflict among the courts of appeals which have confronted the question. Because provisions defining certain acts as cause for discharge are quite common in collective bargaining agreements,[2] and because collective bargaining agreements are quite commonly national agreements in force throughout the country rather than wholly within the confines of a particular court of appeals, the disagreement among the circuits as to the legal effect to be given such provisions is, in and of itself, of great practical importance to the development of the law of labor contracts, and in and of itself, calls for review by this Court.

But this case is not "merely" about this deep division on how to read a particular, prevalent provision in collective bargaining agreements; the conflict among the circuits on that question reflects what Judge Reinhardt recently has termed "the continuing conflict in the courts over arbitration awards." Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over*, 40 Proceedings of the Annual Meeting of the National Academy of Arbitrators 25, 34 (1987). This Court set forth the basic rules governing judicial review almost three decades ago

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[2] *See* Bureau of National Affairs, *Basic Patterns in Union Contracts* 7 (11th ed. 1986) ("Specific grounds for discharge are found in 74% of contracts in the [BNA] database").

in the *Steelworkers Trilogy*,[3] but reecnt decisions, such as those at issue here, make "clear that there are two fundamentally different approaches to the question of judicial oversight of the arbitration process," Reinhardt, *supra*, at 36, and in particular with respect to whether an award which goes "beyond the 'express language of the contract' " is entitled to be enforced, *id.* at 32. That conflict so threatens the vitals of the labor arbitration system as to demand resolution by this Court.[4]

A. Most collective bargaining agreements contain a provision in which the employer agrees not to discharge an employee unless the employee engages in conduct ("cause") which makes the penalty of discharge fair and appropriate ("just" or "proper").[5] Such provisions are understood by arbitrators to "constitute[] a broad charter of responsibility to work out a principled jurisprudence in light of the moral admonition expressed . . . to see that the cause for discipline is just." Kadish, *The Criminal Law and Industrial Discipline As Sanctioning Systems*, 17 Proceedings of the National Academy of Arbitrators 125, 147 (1964). The "real problem" in most discharge cases is deciding "whether [there] was sufficient cause" for discharge. *Id.* at 149 (remarks of Professor Ross).

Not infrequently, that problem is complicated by the existence of plant rules defining dischargeable offenses. Such rules are sometimes jointly agreed to in bargaining and other times are promulgated by the employer pur-

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[3] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960).

[4] *See also Comment*, 18 Wake Forest L. Rev. 902, 912 (1982) ("Both courts and commentators are divided as to whether past practices should be considered when they directly contradict the plain unambiguous language of the collective bargaining agreement").

[5] *See* BNA, *supra* n.2, at 7 ("just cause" required in 88% of collective bargaining agreements in BNA database).

suant to a rule-making authority left to the employer by virtue of the agreement.

Where an employer defends a discharge on the basis of rules which were unilaterally introduced "the union may normally challenge the [rules'] reasonableness and the penalties that may be prescribed for their violation." *Georgia Kraft Co.*, 71 Lab. Arb. 222, 226 (1978). Where, on the other hand, a discharge is predicated on "company rules . . . included as part of a collective bargaining agreement . . . the arbitral inquiry will normally focus upon whether the facts support a finding that the rule was in fact violated *and whether the rule was fairly and reasonably applied in the particular case*. . . . [T]he union can challenge the reasonableness of the rule's application in order to insure that an otherwise legitimate rule has not been applied in an unfair, arbitrary, or discriminatory manner." *Id.* at 226-27 (emphasis added.[6] This is precisely the test the Arbitrators applied in the instant case. *See* pp. 4-6 *supra*.

The principle that the "application" of agreed-upon disciplinary rules is subject to challenge and that a discharge may be overturned if such a rule were applied in an "unfair" or "arbitrary" manner in a particular case, while well-accepted among labor arbitrators, has generated considerable controversy in the courts of appeals. *Seven circuits* (including the First Circuit in the instant case) have confronted the question of whether such an arbitration award "draws its essence from the collective bargaining agreement," *Enterprise Corp.*, 363 U.S. at 597, and thus is entitled to be enforced. The courts have divided 4-3 in their answer to that question.

In concluding that the Gwiazda award is not enforceable, the First Circuit in *Warren I* relied on the Sixth

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[6] *See also* W. Baer, *Discipline and Discharge Under The Labor Agreement* 14-16 (1972); Wollett, *What An Arbitrator Looks For From Management in Discharge Cases*, 9 Emp. Rel. L.J. 525, 527-29 (1984).

Circuit's decision in *Firemen and Oilers Local 935-B v. Nestle Co.*, 630 F.2d 474 (6th Cir. 1980). That case involved a collective bargaining agreement which provided that certain specified offenses (including "incompetency, insubordination, or failure to perform satisfactorily"), "shall constitute cause for the dismissal of any employee from the service of the company." *Id.* at 475. The arbitrator there found that, while the grievant had refused direct orders from his foreman, the grievant was not guilty of all of the offenses charged by the employer and in light of the grievant's long seniority, the arbitrator held that discharge was too severe a penalty. The Sixth Circuit vacated the award. That court concluded that the agreement "is clear and unambiguous" and "*needs no interpretation*" and that under the (supposedly) plain meaning of the contract the arbitrator was not empowered "to decide that discharge is too severe a penalty for the insubordination which he found." *Id.* at 476-77 (emphasis in original). *See also Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board*, 724 F.2d 1217 (6th Cir. 1984); *Autoworkers Local 342 v. TRW, Inc.*, 402 F.2d 727 (6th Cir. 1968).[7]

In *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977), which the court below also cited approvingly, Pet. App. 25a, the Tenth Circuit reached a similar conclusion. The agreement in question there provided that the employer's driver-salesmen "may be discharged for just cause, among which just causes are the following: . . . (G) failure to settle bills and funds collected for the Company within twenty-four (24) hours." *Id.* at 693-94. Based on that rule the employer fired an employee who had accepted a check in payment for a delivery and, as a consequence, had taken

[7] Indeed, even though the arbitrator in *Nestle Co.* made no "specific findings" that the grievant's conduct constituted "insubordination" within the meaning of the collective bargaining agreement, the Sixth Circuit concluded that the grievant's conduct "constituted insubordination as a matter of law," relying on the defini-

seven days to "settle . . . funds collected for the Company." The arbitrator ruled that while the employee had violated the rule, discharge was an excessive penalty. The Tenth Circuit vacated the award stating, "We find no ambiguity in the use of 'may' [be discharged] rather than 'will.' The provision gives the employer the option to discharge or not. The employer exercised the option and discharged [grievant]." *Id.* at 695.

In stark contrast to the decisions of the First, Sixth and Tenth Circuits, the Third, Fifth, Seventh and Eighth Circuits have held that federal courts may not overturn arbitration awards of the type involved here. For example, in *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3rd Cir. 1982), the collective bargaining agreement contained a "just cause" provision and a provision stating that employees "absent from work without good and sufficient cause shall be subject to discharge." The arbitrator overturned the discharge in a case in which the facts found by the arbitrator suggested that the grievant had been so absent. The Third Circuit enforced that award, explaining that even if the grievant had been absent for four days without "good and sufficient" cause, the arbitrator was free to conclude that the "shall be subject to discharge . . . clause was nonmandatory . . . and that consequently the contract authorized [the arbitrator] to apply all the surrounding facts and circumstances to his interpretation of the contract to determine whether or not discharge is proper." *Id.* at 756. The court of appeals reasoned:

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tion of that term provided by *Black's Law Dictionary*. 630 F.2d at 477.

Similarly, in its opinion in *Warren I*, the First Circuit relied upon a digest summary of collective bargaining agreements to hold the terms "proper cause" and "cause" to be synonymous as a matter of law, and thus to conclude that a violation of Rule 7 established "proper cause" for discharge.

> Such an interpretation would certainly not manifestly disregard the language of the agreement or lack support from principles of contract construction. The arbitrator's award may represent an implicit resolution of an inherent tension between [the two provisions]. Certainly it was his obligation to resolve any conflicts in construction. [*Id.*]

Similarly, in *F.W. Woolworth Co. v. Miscellaneous Warehousemen*, 629 F.2d 1204 (7th Cir. 1980), the Seventh Circuit enforced an arbitration award which overturned a discharge of several employees whom the arbitrator found had committed "technical violations" of a company rule by calling their employer on the first day of an illness but not on each subsequent day of their absence from work. The collective bargaining agrement in that case required just cause for discharge and provided that "[v]iolation of any Company rule shall be considered just cause." Like the Third Circuit, the Seventh Circuit upheld the arbitrator's conclusion that the contract did not mean that every "dischargeable offense" necessarily provides just cause for discharge. The Seventh Circuit explained:

> We conclude that the arbitration award in the instant case "drew its essence" from the parties' agreement, viewed in the light of its language, the surrounding circumstances, and the "law of the shop." The provisions at issue were somewhat contradictory so it was appropriate for the arbitrator to interpret them and resolve the ambiguity. His interpretation was rational so it should not have been rejected by the district court. [*Id.* at 1216.]

See also the Fifth Circuit's decision in *Waverly Mineral Products Co. v. Steelworkers*, 633 F.2d 682 (5th Cir. 1980) and the Eighth Circuit's decision in *Kewanee Machinery v. Teamsters Local 21*, 593 F.2d 314 (8th Cir. 1979).[8]

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[8] In *Norfolk Shipbuilding & Drydock v. Boilermakers Local 684*, 671 F.2d 797 (4th Cir. 1982), the Fourth Circuit staked out an

In reaching its decision in *Warren I*, the First Circuit expressly followed the decisions of the Sixth and Tenth Circuits in *Nestle* and *Mistletoe Express Service*, while implicitly rejecting the contrary approach taken by the Third, Fifth, Seventh and Eighth Circuits. Had this case arisen in the latter circuits, the award clearly would have been enforced as the courts in those circuits would have viewed it as within the arbitrator's province to harmonize the "proper cause" provision of the contract here with the Mill Rule defining dischargeable offenses, and thus would not have interfered with the arbitrator's resolution of that issue.

B. The conflict among the circuits just noted reflects, to quote Judge Reinhardt again, "two fundamentally different approaches to the question of judicial oversight of the arbitration process. P. 11, *supra*.

The decisions below in the instant case are, as Judge Reinhardt has observed, "illustrative of the current trend toward emphasizing contract principles and utilizing the 'express language rule.'" Reinhardt, *supra*, at 35. That rule posits first, that if the language of a contract is "plain" the contract must be read literally without regard to bargaining history, past practice, industry custom or the like; and second, that the question of whether contract language has a single plain meaning is a *question of law* which the courts are to resolve in *de novo*. The "two most important articulations of the express language rule," as Judge Reinhardt has observed, "are found in a Sixth Circuit case [*Detroit Coil v. Machinists*,

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intermediate position on the issue posed here. There the arbitrator overturned a discharge in the face of a contract which permitted the employer to discharge "for cause" and stated that "violation of Company rules . . . shall be considered just cause for discharge." The district court overturned the arbitral award but the court of appeals reversed, holding that the Union was entitled to prove that "there was a[] custom or practice in the plant which had been integrated into the contract giving the arbitrator authority to modify the penalty imposed by [the employer]." 671 F.2d at 800.

supra] and a Tenth Circuit case [*Mistletoe Express Serv. v. Motor Expressmen, supra*]" on both of which the court below relied. Reinhardt, *supra*, at 33. "When either is cited in an opinion, one can be almost certain that the award is being overturned." *Id.*

That the First Circuit in the decisions below embraced the "express language" rule is clear from the reasoning of those decisions. That court stated (in words borrowed from the Sixth Circuit's opinion in *Detroit Coil*) that the arbitrator's duty is only to " 'construe ambiguous contract language,' " and that the court's task is to "examine the award and the judgment below in the light of the contract to see if the contract was ambiguous." P. 7 *supra*. By its terms, that formulation precludes an arbitrator from relying on extrinsic evidence of the parties' intent whenever the contract language is, in the court's view, "plain." Indeed, the court below felt free to set aside the Arbitrator's interpretation of the contract without even acknowledging the Arbitrator's reliance on the company's manual and the parties' past practice because that court "disagree[d]" with the arbitrator's conclusion that the contractual language is "ambiguous."

Perhaps the clearest demonstration of how far the courts which have developed the "express language" rule are prepared to go in overturning arbitral awards is the recent decision by the Sixth Circuit in *Dobbs Inc. v. Local 614, International Brotherhood of Teamsters*, 813 F.2d 85 (6th Cir. 1987). In *Dobbs*, the Sixth Circuit made explicit the implications of its earlier decisions—upon which the court below relied—by holding that an arbitration award *fails* to draw its essence from the contract whenever:

> (1) an award conflicts with express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from

> the terms of the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement . . . [*Id.* at 86 (citation omitted).]

Under this approach, past practice, bargaining history, and all other indicia of the intent of the contracting parties become irrelevant if the *court* determines that the arbitrator's award is at odds with the "precise terms" of the agreement, or concludes that the arbitrator has found an implied agreement not "expressly provided" in the contract's written language.

In contrast, the courts of appeals on the opposite side of the question presented here have rejected the express language rule and articulated a very different understanding of both the arbitral role in interpreting labor agreements and the judicial role in reviewing arbitral decisions. Those courts hold that arbitrators are entitled to rely on "context and any other indicia of the parties' intention," *Arco-Polymers*, 671 F.2d at 753, and are *not* duty bound to give a dryly literal reading to the contract's words. Thus, for example, the Seventh Circuit—whose decision in *F. W. Woolworth* is, as we have seen, in square conflict with the decision below in the instant case—has ruled that "contracts have implied as well as express terms and the authority of an arbitrator to interpret a collective bargaining contract includes the power to discover such terms." *Ethyl Corp. v. Steelworkers*, 768 F.2d 180, 186 (7th Cir. 1985). The court in *Ethyl Corp.* went on to observe:

> [D]espite contrary intimations in [the Sixth Circuit's] decision in *Sears Roebuck & Co. v. Teamsters Local 243*, 683 F.2d 154, 156 (6th Cir. 1982), there is no rule that an arbitrator in order to find an implied condition, must first find the language of the contract to be ambiguous. Although a literal reading of the contract in this case would preclude the

implied condition the arbitrator found, he was not obligated to read the contract literally. [*Id.*] [9]

C. In our view, it is only these latter decisions—and not decisions such as the First Circuit's in these cases—which are faithful to the lessons of the *Steelworkers Trilogy*, as elaborated upon more recently in *Paperworkers v. Misco, supra.*

1. The *Trilogy* teaches that "[t]he labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." *Warrior & Gulf*, 363 U.S. at 581-82.[10] More fundamentally, the *Trilogy* recognizes that when the parties provide for arbitration in a collective bargaining agreement, "[i]t is the arbitrator's construction which was bargained for" and hence "the question of interpretation is a question for the arbitrator." *Enterprise Corp.*, 363 U.S. at 599. And under the *Trilogy*, although a court is empowered to assure that the arbitrator does not simply "dispense his own brand of industrial justice" but instead renders an award which "draws its essence from

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[9] *See also Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1278-80 (11th Cir. 1982) (the "arbitrator is not limited to the bare words of the agreement and common law rules for the interpretation of private contracts"; the "arbitrator does not violate his duty to draw the essence of his award from the letter or purpose of the collective bargaining agreement when he relies upon any of several aids to construe the intent of the parties in addition to the express terms of the contract").

[10] *See also* Justice Brennan's concurring opinion in the *Trilogy*, 363 U.S. at 570: the meaning of the labor agreement "is not to be found simply by reference to the dictionary definitions of the words the parties use . . . Words in a collective bargaining agreement, rightly viewed by the Court to be that charter instrument of a system of industrial self-government . . . are to be understood only be reference to the background which gave rise to their inclusion."

the collective bargaining agreement," a court has "no business overruling [the arbitrator] because their interpretation of the contract is different from his." *Id.* at 596-97. Rather,

> The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. [*Id.* at 596]

Any doubt as to the meaning of the *Trilogy* with respect to the scope of judicial authority to enforce a court's understanding of the "express language" of a collective bargaining agreement should have been laid to rest, we believe, by this Court's decision in *Misco.* The Court there reaffirmed the basic teaching of *Enterprise Corp.*:

> The courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract . . .
>
> * * * *
>
> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of local courts. To resolve disputes about the application of a collective bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread

> the contract . . . So, too, where it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect . . . [56 L.W. at 4014].

And the *Misco* Court elaborated on the practical meaning of the "essence" test of *Enterprise Corp.* by explaining:

> [A]s long as the arbitrator is even *arguably* construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed *serious* error does not suffice to overturn his decision. [56 L.W. at 4014; emphasis added.]

Indeed, with respect to the specific issue raised here, in *Misco* the Court squarely held that it is for arbitrators, and not courts, to decide if a contract precludes arbitral review of whether the penalty of discharge is just or proper for a particular type of offense. The *Misco* Court noted that while "[n]ormally, an arbitrator is authorized to disagree with the sanction imposed for employee conduct . . . [t]he parties . . . may limit the discretion of the arbitrator in this respect," and the Court acknowledged the force of the Company's contention that "under the contract involved here, it was within the unreviewable discretion of management to discharge an employee once a violation of Rule II.1 was found." *Id.* 4015.[11] But

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[11] Like Rule 7(a) in this case, Rule II.1 in *Misco* provided that possessing or using drugs on plant premises constituted a "cause[] for discharge."

The court below suggested that this case might be distinguishable from *Misco* on the ground that the contract here "more clearly reserves the power to discharge one who violates [a] Company rule" because under this contract the "Company reserves the sole right to . . . discharge employees for proper cause." Pet. App. 109a, 110a-1a; *see also id.* at 6a. But contrary to the lower court's speculation, the collective bargaining agreement in *Misco* in fact provided that

> the Company reserves and retains, *solely and exclusively*, all its inherent rights to manage the business as such rights

the *Misco* Court observed that the arbitrator's opinion suggested a different interpretation of the contract as the arbitrator "cryptically observed that Rule II.1 merely listed causes for discharge and did not expressly provide for immediate discharge." *Id.*[12] And the Court concluded that it was *not* for the appellate court to "dispos[e] of this case on the ground that Rule II.1 had been violated and discharge was therefore proper"; rather, if that issue were determinative and if the arbitrator's award were unclear in this regard, "*the proper course would have been remand to the arbitrator for a definitive construc-*

> existed prior to the execution of this Agreement. . . . [T]he management rights not abridged by this Agreement include, but are not confined to, the right to . . . reprimand, *discharge* or otherwise discipline employees. [Petition for Certiorari in No. 86-651 at 27a-28a; emphasis added.]

The *Misco* contract further provided that

> The Company shall retain the right to establish, maintain, enforce, rescind, amend or change rules and regulations relating to the discipline or discharge of employees and the procedures for issuance of reprimands and other forms of discipline. The Union may challenge any plant rule within fifteen (15) days after . . . posting . . . [*Id.* at 30a.]

Thus, if anything, the contract in *Misco* more clearly preserved management's authority over discharges than does the contract involved in this case.

[12] The Arbitrator in *Misco* had stated:

> [I]t should be pointed out by the Arbitration that Section II of the Company Rules does not say anything about immediate discharge. Section II only lists "causes for discharge." As an example, reading on duty except where required in line of duty is listed under Section II. Is this a cause for immediate discharge? It is difficult for this Arbitrator to see where both reading on duty and being involved with marijuana in the manner Grievant is charged have equal weight for immediate discharge. [*Id.* 45a]

The Arbitrator in *Misco* did not pursue the point further presumably because he found the grievant was not guilty of the offense charged.

tion of the contract in this respect." Id. (emphasis added.)

2. Given the foregoing we would have thought, as Chief Judge Coffin concluded, pp. 9-10 *supra*, that *Misco* indisputably requires that the Arbitrators' decisions in this case be sustained. But the decisions below, and the Sixth Circuit's recent decision in *United Inter-Mountain Telephone Co. v. Communications Workers*, No. 87-5701 (6th Cir., April 25, 1988),[13] reveal that there is still confusion as to the appropriate scope of judicial review of arbitral awards.

In particular, in *Warren II* the court below relied on *Misco*'s statement that "[t]he arbitrator may not ignore the plain language of the agreement," Pet. App. 10a, *quoting*, 56 L.W. at 4014, and elevated that observation —which on its face means only that an arbitrator should *start* from an agreement's plain language—into a requirement that arbitrators are to give a *literal* reading to all "plain" terms of a collective bargaining agreement, and that a court is free to overturn an award if the court arrives at a different understanding than the arbitrator of the "plain language." *See* p. 17 *supra*. On that basis, the *Warren II* court concluded that "it cannot be said that the arbitrator even 'arguably constru[ed] or appl[ied] the contract," Pet. App. 11a, even though the arbitrator's award demonstrated conclusively that the arbitrator had gone to great pains to do precisely that, albeit with a different result than the court below desired in its judicial wisdom.[14]

[13] The Communications Workers are filing contemporaneously with this petition, a petition for a writ of certiorari in *United Inter-Mountain*. Counsel for the Union in this case have collaborated with union counsel in *United Inter-Mountain* in preparing the petition in that case, and we incorporate here the arguments made therein. A copy of the petition in *United Inter-Mountain* is being served on counsel for respondent in this case along with the instant petition.

[14] In *Warren III*, the court of appeals attempted to buttress *Warren II*'s reading of *Misco* as follows:

By reading *Misco* to vindicate the "clear-language" rule, the decisions below threaten further mischief to the arbitral system. For that reason, too, the decisions below either should be overturned summarily or else subject to plenary consideration by the Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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> The Supreme Court specifically said in *Misco* that its result might have been different had the issue before it there been the same as the issue before us here, namely, whether the contract gives to the Company the *sole right* to discharge one who violates a particular Company rule. [Pet. App. 110a]

To support this reading the *Warren III* panel quoted from *Misco* the sentences in which this Court noted that *"it may be,* as the company argues, that under the contract involved [in *Misco*], it was within the unreviewable discretion of management to discharge an employee *once a violation of Rule II.1 was found." Id.* (emphasis added by the court of appeals). Remarkably, however, the *Warren III* panel ended that quotation with ellipses, thereby omitting this Court's final sentence which made clear that it was for the *arbitrator* to render a *"definitive construction"* as to whether discharge falls within the "unreviewable discretion of management." 56 L.W. at 5015 (emphasis added). Here, of course, the Arbitrator dealt with that question at length and in detail and concluded that the agreement does not grant such a discretion.

88-462 (2)

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF
SCOTT PAPER COMPANY,
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1405

S.D. WARREN COMPANY,
A DIVISION OF SCOTT PAPER COMPANY,
Petitioner, Appellant,

v.

UNITED PAPERWORKERS' INTERNATIONAL UNION,
AFL-CIO, LOCAL 1069,
Respondent, Appellee.

ON REMAND FROM THE SUPREME COURT
OF THE UNITED STATES

[Hon Gene Carter, *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Torruella, *Circuit Judge*,
and Pieras,* *District Judge*.

S. Mason Pratt, Jr. with whom *Elizabeth S. Pearce* and *Pierce, Atwood, Scribner, Allen, Smith & Lancaster* were on brief for appellant.

Stephen P. Sunenblick with whom *Charles W. March* and *Sunenblick & Reben* were on brief for appellee.

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* Of the District of Puerto Rico, sitting by designation.

April 21, 1988

TORRUELLA, *Circuit Judge*. After our opinion in this case, *S.D. Warren Co.* v. *United Paperworkers' International Union*, 815 F.2d 178 (1st Cir. 1987) (*Warren I*), the Supreme Court of the United States decided *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, 108 S. Ct. 364 (1987). Thereafter, appellant's pending petition for a writ of certiorari was granted, our judgment was vacated, and the case was remanded to us for further consideration in light of that decision. It is thus incumbent upon us to determine whether our prior ruling should in any manner be altered by this recent case. In our view, although *Misco* may partially preempt *Warren I*, it does not affect its basic holding.

In *Misco* the employer and the union entered into a collective bargaining agreement in which they agreed to submit to arbitration any grievance that arose from the interpretation or application of its terms and made the arbitrator's decision final and binding upon the parties. The agreement further provided that the arbitrator's authority was limited to the interpretation and application of the terms contained in the agreement itself. In addition, the agreement reserved to management the right to establish, amend, and enforce "rules and regulations regulating the discipline or discharge of employees," and the procedures for imposing discipline, but these rules, after posting, were subject to be "ruled on by grievance and arbitration procedures as to fairness and necessity." *Id.* at 367. One of the rules enacted by the employer provided as a cause for discharge bringing intoxicants, narcotics, or controlled substances on to plant property or consuming them there.[1] *Id.* at 367-68.

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[1] The rule included the following as causes for discharge: "Bringing intoxicants, narcotics, or controlled substances into, or con-

An employee suspected of drug-related activities was observed by police in an automobile with two other persons while the car was in the company's parking lot during working hours. After the two persons left, the police approached the car and found the employee in the back seat of the car. They detected marijuana smoke in the air and found a lighted marijuana cigarette in the front seat ashtray. Thereafter the police proceeded to search the employee's own car, where they found a plastic scales case as well as marijuana gleanings. On the basis of this later incident, the employee was arrested and charged with possession of marijuana, a charge to which he pleaded guilty.

The employer discharged the employee, asserting that his presence in the first car, in which the marijuana smoke and lighted marijuana cigarette were found, violated the company rule against having drugs on plant premises. At the time of this personnel action the employer was unaware of the incident or charges involving the employee's own car.

The employee filed a grievance protesting his discharge, and the matter proceeded to arbitration. At the hearing the issue stipulated to be decided by the arbitrator was whether the company had just cause to discharge the employee under the rule prohibiting possession of drugs on company premises, and "'[i]f not, what if any should be the remedy.'" *Id.* at 368.

In ruling that the employer lacked just cause to discharge the employee for possession of marijuana on company premises, the arbitrator excluded evidence regarding the marijuana found in the employee's own car. The arbitrator concluded that this evidence was irrelevant to

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suming intoxicants, narcotics or controlled substances in the plant, or on plant premises. Reporting for duty under the influence of intoxicants, narcotics, or controlled substances." *Misco*, 108 S. Ct. at 368 n.2.

the employee's discharge because the employer was unaware of the same at the time of the disciplinary action. The arbitrator then ruled that the employee's mere presence in the first vehicle was not sufficient evidence to establish that the employee was in possession of drugs on company premises.

The company challenged this ruling in district court, claiming that it was contrary to public policy, a contention with which that court agreed. The court of appeals affirmed, ruling that the arbitrator should have taken into consideration the evidence uncovered by the police in the employee's car. *See Misco* v. *United Paperworkers*, 768 F.2d 739, 742-43 (5th Cir. 1985). In light of such evidence the court of appeals concluded that public policy prevented enforcement of the arbitrator award. *Id.* at 743.

Although the Supreme Court granted a writ of certiorari "on the question of when courts may set aside arbitration awards as contravening public policy," *Misco*, 108 S. Ct. at 369, the parties argued in the alternative, and the Court also decided, the issue of whether the court of appeals had exceeded its limited authority to review an arbitrator's award. *Id.*

In reversing, the Supreme Court first attacked the court of appeals' review of the arbitrator's findings. Quoting extensively from the time-honored standards of the *Steelworkers Trilogy*[2] the Court reemphasized that it was "the arbitrator's view of the facts and of the meaning of the contract that [the parties had] agreed to accept," and that "[c]ourts [did] not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *Misco*,

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[2] *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

108 S. Ct. at 370. The Court also ruled that "where it [was] contemplated that the arbitrator [would] determine remedies for contract violations that he [found], courts [had] no authority to disagree with his honest judgment in that respect." *Id.* at 371.

In applying these principles the Court concluded that the court of appeals had exceeded its authority in ruling, contrary to what was determined by the arbitrator, that the employee's presence in the first car was ample proof of violation of the rule against possession of narcotics on company premises. *Id.* It also held that the court of appeals had overextended itself in considering the rejected evidence that was found in the employee's car. *Id.*

On the question of the remedy, the Court ruled that although "[t]he parties, of course, may limit the discretion of the arbitrator in this respect," where "the parties stipulated that the issue before the arbitrator was whether there was 'just' cause for discharge, and the arbitrator, in the course of his opinion . . . observed that [the rule in question] merely listed causes for discharge and did not expressly provide for immediate discharge," the court of appeals was obliged, "before disposing of the case on the ground that [the rule] had been violated and discharge was therefore proper . . . [to] remand to the arbitrator for a definitive construction of the contract in this respect." *Id.* at 372-73.

The Court then went on to discuss the court of appeals' principal holding that "to reinstate a person who had brought drugs onto the property was contrary to public policy." *Id.* at 373. The Court ruled that such grounds were unavailable as a basis for "refusal to enforce an arbitrator's *interpretation* of [a collective bargaining contract unless] the contract as interpreted would violate 'some explicit public policy' that is well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations

of supposed public interests.'" *Id.* (emphasis in the original; citations omitted). The Court concluded that no violation of such policy had been clearly shown. *Id.* at 374.

The factual background in *Warren I* differs from *Misco* on significant points.

In *Warren I*, as in *Misco*, the collective bargaining agreement provides for arbitration of grievances following informal conciliation attempts. Also, the scope of the arbitrator's authority is "concerned solely with the interpretation and/or application of the collective bargaining agreement," as to which "[t]he decision of the arbitrator shall be final and binding on the parties." The parties also agree that "the arbitrator shall have no power to render a decision which in any way modifies any provision of the agreement." However, in *Warren I* the management rights clause provides that "[t]he Company reserves the *sole* right to manage the business of the Company and to direct the working force." (emphasis supplied). This *sole* "right includes but is not limited to . . . the right to . . . discharge employees for proper cause. . . ." More significantly, the parties specifically negotiated and agreed to the disciplinary rules to be applied in the plant. The negotiated rules were appended to the contract. One of them, Mill Rule 7(a), stated as follows:

> 7. Causes for Discharge. . . . Violations of the following rules are considered causes for discharge: (a) Possession, use or sale on Mill property of . . . marijuana. . . .

As a result of a police undercover operation in the company's plant, twelve employees were discharged for violating Mill Rule 7(a). The union filed a grievance regarding three of these employees which eventually came before an arbitrator. The arbitrator "found to be proved beyond a reasonable doubt, that all three employ-

ees violated Mill Rule 7(a)." *S.D. Warren* v. *United Paperworkers Intern.*, 632 F. Supp. 463, 465 (D. Me. 1986). The arbitrator, however, after rejecting the company's position that the plain meaning of the contract provided for immediate discharge for violation of Mill Rule 7(a), determined that the employees' discharges were not justified, and proceeded to substitute that penalty with one entailing suspension. *Id.* at 466. In so concluding, the arbitrator ruled that she had authority to substitute the penalty imposed by the company because there was ambiguity between Rule 7(a) and the management rights clause in that "the contract did not unequivocally state that the conduct listed in Mill Rule 7(a) was *proper* cause for discharge as required by the Management Rights and Seniority Provisions." *Id.* (emphasis in the original).

The employer challenged the award in district court on the basis that its enforcement would violate public policy and because it allegedly ignored the plain meaning of the agreement. The magistrate who initially ruled on this matter rejected the first argument but recommended vacation of the award on the second ground. *Id.* at 467.

The district court disagreed with the company on both grounds and refused to vacate the award. Relying on the advice of *United Steelworkers* v. *Warrior & Gulf Navigation Company*, 363 U.S. 574, 582-83 (1960), to the effect that arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," the district court concluded that the arbitrator had authority to reduce the company's chosen penalty because of the alleged ambiguity between the rule and the management rights clause. *S.D. Warren Co.*, 632 F. Supp. at 467. As to the public policy argument, the court ruled, citing *W.R. Grace & Company* v. *Local Union 759*, 461 U.S. 757, 766 (1983), that only where the contract as interpreted by the arbitrator vio-

lates some "explicit," "well defined and dominant" public policy exemplified by "laws and legal precedents" would a court be obligated to refrain from enforcing the award on public policy grounds. *S.D. Warren Co.*, 632 F. Supp. at 469. The district court found that the existence of state and federal laws which provide "only light penalties in connection with possession, furnishing, or distributing a small quantity of marijuana as in this case here," did not provide sufficient specificity for purpose of finding public policy violations, because these laws were directed to the public at large. *Id.* at 469-70.

We reversed the district court, ruling that the arbitrator had exceeded her contractual authority and that the award violated public policy.[3] *Warren I*, 815 F.2d 178 (1st Cir. 1987).

We reaffirm our ruling that the arbitrator exceeded her contractual authority in overturning the employees' discharges in this case. We shall assume without deciding that *Misco* forecloses the alternate public policy grounds upon which we decided *Warren I*. *But see Iowa Electric Light & Power* v. *Local Union 204*, 834 F.2d 1424, 1428 (8th Cir. 1987) (*Warren I* relied upon after *Misco* as basis for refusing to enforce arbitration award on public policy grounds).

It is, of course, beyond cavil that courts are not authorized to reconsider the merits of arbitration awards, even where errors of fact or misinterpretation of the facts appear from the face or record of those proceedings. *Misco*, 108 S. Ct. at 370:

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts

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[3] Chief Judge Campbell filed a separate opinion, concluding that it was unnecessary for the court to reach the public policy issue. *Id.* at 187-88.

> and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decision of lower courts. To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them.

Id. at 370-71.

Contrary to *Misco*, in the present case there has been no attempt to set aside or undermine the arbitrator's findings of fact. On the basis of the undisputed facts relied upon in *Warren I*, the arbitrator "found that the grievants had violated Mill Rule 7(a)." *Warren I*, 815 F.2d at 180-81. In fact the arbitrator found that these violations were "proved beyond a reasonable doubt." *S.D. Warren*, 632 F. Supp. at 465.

However, established arbitration law does not stop with our previous recitation concerning arbitrators' findings of fact:

> The same is true of the arbitrator's interpretation of the contract. . . . [T]he parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract. So, too, *where it is contemplated that the arbitrator will determine remedies* for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. . . ."

Misco, 108 S. Ct. at 371 (emphasis supplied).

Notwithstanding this narrow review standard, one which we have long honored in this circuit, *see Bettencourt* v. *Boston Edison Company*, 560 F.2d 1045, 1050 (1st Cir. 1977), we cannot enforce the award in this case because in it "the arbitrator [has] ignore[d] the plain language of the contract" and because the award fails to draw its "essence" therefrom and "simply reflect[s] the arbitrator's own notions of industrial justice." *Misco*, 108 S. Ct. at 371; *Enterprise Wheel*, 363 U.S. at 599. In this case the unambiguous language of the management rights' contract and Mill Rule 7(a) do *not* "contemplate[ ] that the arbitrator determine remedies" for those violations. The remedies have been pre-determined for those violations.

Several factors lead us to this severe conclusion. Here, differently than in *Misco*, the company and the union negotiated and incorporated into the collective bargaining agreement the disciplinary rules and the resulting penalties for violations of these rules. Nothing is left to the arbitrator's judgment except determining whether the rules are violated. An uncomplicated reading of the contract reveals that management has the *sole* right to discharge employees for cause, the definition of which includes possession of marijuana on Mill property. It is not a question of a strained interpretation by the arbitrator with which we might agree or disagree, but rather a reading of the plain language of the contract which removes from the arbitrator the authority to determine a remedy once she concludes that a certain rule has been breached. The parties negotiated and agreed to the remedy for violations of Rule 7(a). Here the arbitrator found a violation of that rule by reason of the employee's possession of marijuana on mill property. The rule plainly states that such a violation is "cause for discharge." The management rights clause provides that the company "reserves the sole right to . . . discharge employees for proper cause. . . ." The arbitrator,

himself, agreed "that arbitrators generally consider synonymous the language 'proper cause,' 'just cause,' or 'cause.'" App. to Brief for Appellee at 111. Therefore, the contract plainly states that the company has the sole right to discharge employees for the violation which admittedly occurred. In the face of the contract's unambiguous language to this effect, it cannot be said that the arbitrator even "arguably construe[d] or appl[ied] the contract." The award altered the previously agreed penalty for this conduct. By substituting the arbitrator's own "brand of industrial justice" over that established in the contract, the arbitrator engaged in a proscribed modification of the agreement.

As stated in *Misco*, 108 S. Ct. at 371, if the parties do not pre-negotiate remedies, the arbitrator can fashion them as part of his decisional discretion. Were we to sustain that authority in this case, notwithstanding the pre-negotiation that took place, it would be the equivalent of our saying that the parties engaged in a meaningless act by negotiating the disciplinary rules and incorporating them into the collective bargaining agreement. We would be saying that the arbitrator retained the right to fashion remedies even when this *contractual* authority was not given by the parties. That is not the law. *Id.*

The award is not entitled to enforcement.

Reversed.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 87-583

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, No. 1069,

Petitioner,

v.

S. D. WARREN COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

THIS CAUSE having been submitted on the petition for writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs, and that this cause is remanded to the United States Court of Appeals for the First Circuit for further consideration in light of *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, 484 U.S. —— (1987).

IT IS FURTHER ORDERED that the petitioner, United Paperworkers International Union, AFL-CIO, No. 1069, recover from S. D. Warren Company Two Hundred Dollars ($200.00) for its costs herein expended.

December 14, 1987

Clerk's cost: $200.00

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 86-1405

S.D. WARREN COMPANY,
A DIVISION OF SCOTT PAPER COMPANY,
Petitioner, Appellant,

v.

UNITED PAPERWORKERS' INTERNATIONAL UNION,
AFL-CIO, LOCAL 1069,
Respondent, Appellee.

Appeal from the United States District Court
for the District of Maine
[Hon. Gene Carter, a *U.S. District Judge*]

Before

Campbell, *Chief Judge*,
Torruella, *Circuit Judge*,
and Pieras,* *District Judge*.

S. Mason Pratt, Jr. with whom *Elizabeth S. Pearce* and *Pierce, Atwood, Scribner, Allen, Smith & Lancaster* were on the brief for appellant.

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* Of the District of Puerto Rico, sitting by designation.

Stephen P. Sunenblick with whom *Charles W. March* and *Sunenblick & Reben* were on brief for appellee.

March 31, 1987

PIERAS, *District Judge.* This appeal is from a judgment of the United States District Court for the District of Maine, enforcing an arbitration award under the jurisdiction provided by section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. section 185 (1982). The district court upheld the arbitrator's decision that the collective bargaining agreement was ambiguous as to the kind of right given the employer to discharge employees involved with drugs, that the contract allowed the arbitrator to review the degree of punishment to be given the employee, and that the arbitrator's award did not violate public policy. *S.D. Warren Co. v. United Paperworkers International*, 632 F. Supp. 463 (D. Me. 1986).

These erroneous conclusions, which are the basis of both the arbitrator's award and the judgment below, require that the judgment be reversed and the award vacated.

I.

The United Paperworkers' International Union, AFL-CIO, Local 1069, in representation of employees of S. D. Warren Company, entered into a collective bargaining agreement with S. D. Warren. The pertinent portions of the collective bargaining agreement for the purposes of our review follow. The Management Rights Clause affirmed that

> [t]he Company reserves the sole right to manage the business of the Company . . . and to direct the work-

> ing force. The right includes but is not limited to . . . the right to . . . demote, transfer, discipline, suspend or discharge employees for proper cause or to relieve them from duties because of lack of work or for other legitimate reasons.

The contract provided for levels of conciliation proceedings culminating in arbitration. The scope of the arbitrator's authority was circumscribed as follows:

> the matter may be referred to by either party to an arbitrator for decision, but it is agreed that the matter thus referred shall be concerned solely with the interpretation on and/or application of the collective bargaining agreement. . . . The decision of the arbitrator shall be final and binding on the parties.

The parties to the contract further defined the role of the arbitrator by agreeing that "the arbitrator shall have no power to render a decision which in any way adds to, subtracts from, or modifies any provision of the agreement."

As an appendix, the contract also contained Mill Rules. Rule 7 read as follows:

> 7. Causes for Discharge. In any organization, certain rules of conduct must be observed by the members for the good of all. Violation of prescribed rules are cause for disciplinary action of varying degrees of severity. Violations of the following rules are considered causes for discharge: (a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. The possession or use of a specific narcotic or drug properly prescribed by a licensed physician is the only exception to this rule.

The seriousness of the drug offenses proscribed in the contract was brought to the attention of the employees many times, including a union newsletter: "Once again

it is necessary to remind everyone that the use of illegal drugs and/or alcohol is, a very serious offense. The company has notified the Union that anyone caught possessing and/or using drugs or alcohol on company property will be immediately terminated."

The Maine State Police Drug Unit investigated the drug problem at employer's plant. An undercover narcotics agent was employed at the mill. As a result of the investigation, twelve employees, including the grievants, were shown to have violated Mill Rule 7(a) and consequently were discharged by the employer.

The Union took the grievance to arbitration. Arbitrator Suzanne Gwiazda found that the grievants had violated Mill Rule 7(a). The arbitrator found extenuating circumstances in each case and decided that suspension, not discharge, was the appropriate sanction. Although we believe that the nature of extenuating circumstances are immaterial for the purpose of deciding this case, we will nevertheless refer to them to demonstrate that such personal concern by the arbitrator violated the clear language of the Management Rights Clause. The arbitrator took into consideration that grievant Linda Willoughby was the only female in her department and under pressure to do her work faster, was advised by employer's physician to take an extended leave, and was diagnosed as suffering from anorexia nervosa. Willoughy gave the investigator only a small amount of marijuana. Kimberly Denis was also the only woman in her area and dependent on the investigator for a time. She sold the agent twenty dollars worth of marijuana. Grievant Debra Graham was approached by the agent six or seven times about drugs and eventually sold him four grams of marijuana for thirty dollars.

The arbitrator's award was based on the undisputed facts recounted here. The arbitrator's pivotal conclusion, however, was that Mill Rule 7(a) is ambiguous in that

it does not use the obligatory "must" when delineating the employer's right to terminate for violation of the rule. Although the permissive "may" does not appear in the contract, the word did appear in this context in the company's safety policy handbook. The arbitrator found this noteworthy and concluded that she could assess the kind of infringement of the rule and provide a punishment less than the sole punishment allowed by the collective bargaining agreement. The arbitrator also relied on the Management Rights Clause's identification of "proper cause" required for discharge while the heading of Rule 7 was simply "Causes for Discharge." This discrepancy, in the arbitrator's eyes, was sufficient to place the entire matter of discipline within her interpretative domain.

The district court affirmed the award, stating that it would not construe "cause" as equivalent to "proper cause" and declined to disturb the arbitrator's decision. *S.D. Warren*, 632 F. Supp. at 468. Further, the court stated that it could not be said that the arbitrator's reasoning was "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Bettencourt v. Boston Edison Company*, 560 F.2d 1045, 1050 (1st Cir. 1977). Consequently, it dismissed the employer's complaint. The court also found that the award did not violate public policy. *S.D. Warren*, 632 F. Supp. at 468.

We disagree that Mill Rule 7(a) was so ambiguous that it took away from the employer the exclusive right to determine the punishment to be imposed for violation of that clause, and that the scope of the arbitration clause invested the arbitrator with the ultimate decision pertaining to punishment. We also disagree with the arbitrator and court below that the award does not violate public policy. Accordingly, we reverse the district court's judgment and vacate the arbitration award.

II. THE ARBITRATOR'S AUTHORITY TO INTERPRET THE CONTRACT

The fact that cases, for quite practical reasons, have allowed arbitrators great latitude in interpreting collective bargaining agreements does not detract from the fact that all arbitration awards must draw their essence from the collective bargaining agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The purpose of the bargaining is to reach an agreement where competing yet legitimate interests are defined and accommodated. The definition of such interests is important because ambiguity may cost the parties great loss and irreparable damage through strikes, work slow-downs, and lawsuits that affect the stability of the employer and its employees. Labor negotiations are an intense enterprise that, besides taking precious time and money, settle general business planning. Dealing with the economic survival of all concerned, they are often emotionally charged. During the course of negotiations, parties give in to each other's wishes in exchange for some advantage gained. Thus, the wills of the parties are tempered and accommodated to the point where the meeting of the minds is forged into a social contract, the collective will of all. This dear time invested in negotiations creates a balance of rights and obligations—rarely equaled by the best prestidigitator in his prime—which is essential to the administration of the enterprise and serves as the legal train that carries the relations between the employer and its unionized employees. This balance of equities cannot be disturbed by glossing onto the contract the social philosophy of an arbitrator. The contract itself, not the arbitrator, is the social instrument containing the collective reason of the parties to it.

In order to promote arbitration and avoid delays in decision that industries can ill afford, Congress enshrined arbitration as the preferred means of resolving industrial disputes. Labor-Management Relations Act of 1947

§ 203(d), 29 U.S.C. § 173(d) (1982). It is salutory to protect the conciliation and arbitration procedure of the collective bargaining contract. In most cases, disputes are resolved at the initial level of the meeting between the foreman and the shop steward or between the personnel manager and the union representative that takes place on the premises immediately following the grievance. If the grievance proceeds to arbitration, the dispute is reviewed by persons usually conversant with the industry and its problems and sitting in the same community as the parties. Such a procedure keeps the wheels of production and progress turning without interruption. Therefore, the courts have devised a series of rules to smooth the arbitration procedure and effectively endowed the arbitrator with extraordinary authority, even more authority than a court of first instance. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960) (arbitration clause will preempt court jurisdiction over labor dispute); *United Steelworkers v. Gulf & Western Co.*, 363 U.S. 574 (1960) (disputes between employer and union presumptively arbitrable); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) (arbitration awards shall be enforced unless they do not draw their essence from the collective bargaining agreement).

Most reasons advanced for the special treatment of the conciliation and arbitration procedure have been of a practical nature. Compared with litigation, arbitration is more expedient and less expensive. The agreement that the arbitrator's award be final and binding cuts off further uncertainty as to the rule of the shop, and allows greater efficiency and better planning through a peaceful resolution of labor disputes. R. I. Abrams, "The Integrity of the Arbital Award", 76 Mich. L. Rev. 231 (1977). Deeming it necessary to protect this working procedure in the labor relations field, the courts have adhered to the rule that an arbitrator's interpretation of

the collective bargaining agreement is final and binding on the parties because it is the interpretation that is bargained for by the parties. *Enterprise Wheel & Car*, 363 U.S. at 597; *In re Hotel Da Vinci, Inc.*, 797 F.2d 33, 34-35 (1st Cir. 1986); *Hoteles Condado Beach v. Union*, 763 F.2d 34, 41 (1st Cir. 1985).

Nevertheless, the courts have not been willing to sacrifice logic, reason, and sound principles of contract law on the alter of the practicality of giving unlimited power to arbitrators and absolute deference to their interpretations of collective bargaining agreements.

> An arbitrator is confined to the interpretation or application of the collective bargaining agreement; he does not sit to dispose his own brand of industrial justice. He may, of course, look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Enterprise Wheel & Car, 363 U.S. at 597.

This Circuit has followed this directive allowing an arbitration award to be vacated when the award is " 'unfounded in reason and fact' . . . or is based in reasoning 'so palpably faulty that no judge or group of judges could ever conceivably have made such a ruling,' or is mistakenly based on a crucial assumption which is 'concededly a non-fact.' " *Bettencourt*, 560 F.2d at 1050 (citations omitted). Other circuits have dealt with the limitation of the power of an arbitrator and have found that he is "confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions." *Detroit Coil v. International Association of Machinists*, 594 F.2d 575, 579 (6th Cir.) *cert. denied*, 444 U.S. 840 (1979).

The Federal Arbitration Act, 9 U.S.C. § 10 (1982) is applicable to labor cases of this nature. *Electronics Corporation of America v. International Union of Electrical, Radio and Machine Workers, Local 272*, 492 F.2d 1255, 1258 (1st Cir. 1984); *see also Hoteles Condado Beach*, 763 F.2d at 42. The act provides that a district court may issue an order vacating an award

> (d) [w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and indefinite award upon the subject matter submitted was not made.

When the arbitrator exceeds her power or imperfectly executes it to the extent outlined in the Federal Arbitration Act, the arbitration award cannot draw its essence from the collective bargaining contract and such construction is not the one the parties bargained for.

The usual case is where the management prerogative to discipline is not coupled with a specific punishment for the violation. Then, the punishment imposed by management together with the factual basis for the punishment is subject to review by the arbitrator. This is not the case before us. Here, not only did the collective bargaining agreement specifically delineate the precise punishment for violation of Mill Rule 7(a) ("violations of the following rules are considered causes for discharge . . ."), the agreement also contained a Management Rights Clause reserving to the company "the right to . . . discharge employees for proper cause." The agreement further specified that "the arbitrator shall have no power to render a decision which in any way adds to, subtracts from or modifies any provision of the agreement." Collective Bargaining Agreement, Art. XII, section 6.

The case of *Local 217, International Union of Electric Radio and Machine Workers v. Holtzer-Cabot Corporation*, 277 F. Supp. 704 (D. Mass. 1967), dealt with a contract where the offense and the penalty for that offense were specified.

31. *Personal Conduct*

The extent of any disciplinary action will depend upon the seriousness of the offense in the judgment of the Factory Management, with due regard for previous records of factory rules observance.

As a guide for personal conduct, there are listed below certain acts of misconduct that should be avoided for the good of all. These actions or rule violations are classified into three categories: the least serious rule violations are listed under Group I, the more serious under Group II, and the most serious under Group III.

Group II.

c. The making of false, vicious, or malicious statements concerning another employee. . . .

f. The use of abusive, obscene, profane, or threatening language to fellow employees.

PENALTIES FOR FAILURE TO OBSERVE COMPANY RULES

Group II.

First Violation of any Group rule: One week's suspension without pay.

Second Violation of same rule or two first violations of different Group II Rules: Dismissal.

Local 217, 277 F. Supp. at 707.

The arbitrator found a violation of the above-cited rule. The court decided that the penalty for violation of the rule in question was a matter left to the discretion of management and that the arbitrator could not modify the penailty "simply because he thought mitigating circumstances rendered [suspension] too severe." 277 F. Supp. at 708. The court further stated that the arbitra-

tor, having found that the employee violated the rule, lacked authority under the contract to alter the penalty.

In *International Brotherhood of Firemen and Oilers v. The Nestle Company*, 630 F.2d 474 (6th Cir. 1980), the court reversed the judgment of the district court enforcing an arbitration award. The collective bargaining agreement contained a standard management rights clause. It described particular violations as follows: "Art. XII(a) Intoxication, dishonesty, incompetency, insubordination or failure to perform satisfactorily the usual, customary duties of the employee, shall constitute cause for the dismissal of an employee from the service of the company." 630 F.2d at 475. The arbitrator found that the offense had been committed but reduced the penalty determined by management. The Sixth Circuit, in vacating the award and characterizing the arbitrator's reasoning as "incredible," stated:

> In our case, the collective bargaining agreement expressly provided that insubordination shall be grounds for discharge. It is clear and unambiguous. It needs no interpretation and we find no provision in it giving the arbitrator power to prescribe the penalty for violation of the collective bargaining agreement or to control the exercise of it by the employer. This power was vested solely in the employer.

630 F.2d at 477.

All these decisions are grounded on the principal that in management resides the inherent right to manage and that the right to manage includes the prerogative to discharge for cause. If the parties to a collective bargaining agreement have the intention to reverse this traditional understanding, they must do so by express and clear language divesting the employer of this right. The language in the contract before us specifies the penalty for violation of Mill Rule 7(a). Instead of withdrawing the rights of management, the parties ratified them.

Now we must examine the award and the judgment below in the light of the contract to see if the contract was ambiguous. The bare argument of ambiguity is based on the fact that Mill Rule 7(a) does not state in so many words that the employer must terminate an employee for a violation. Appellee argues that this makes the rule ambiguous and that therefore the arbitrator could determine the punishment. It is further argued that the contract is also ambiguous because, in the Generai Management Clause, the employer may terminate for "proper cause" and in Rule 7 providing the authority to terminate, the heading reads "Causes for Discharge.

We disagree. The phrases "proper cause" and just plain "cause" in the labor relations parlance are interchangeable and have the same meaning. The common, everyday meaning is identical; all connote the conclusion that there is a cause that justifies the action. *Cf.* 2 Collective Bargaining: Negotiations and Contracts (BNA) § 40:1 (1983) (grouping "for cause" and "for just cause" dismissal standards for statistical purposes). If possession of marijuana is cause for discharge, as Mill Rule 7(a) flatly says, we are at a loss to see how it would not also be "proper cause" for discharge. The agreement does grant the employer the right to apply disciplinary action varying in degree of severity in accordance with the rule violated: "Violation of prescribed rules are cause for disciplinary action of varying degrees of severity." This clause applies to certain violations. But as to violations of Rule 7(a), the right of the employer is to discharge. Therefore, we conclude that the parties at the bargaining table had a meeting of the minds, that in cases of possession, use, or sale of marijuana on company property, the employer had a right to discharge.

In the case of *Litvak Packing Co. v. Amalgamated Butcher Workmen Local No. 641*, 455 F. Supp. 1180 (D.

Colo. 1978), the contract provided: "No employee covered by this agreement shall be suspended, demoted or dismissed without just and sufficient cause. Sufficient cause for discharge shall include, among other reasons . . . insubordination." *Id.* at 1180. The employer discharged the employee for insubordination. However, the arbitrator found extenuating circumstances and concluded that "[o]n balance, [the] indiscretion [does] not warrant the penalty of discharge" and ordered his reinstatement with back pay accruing after a two-month suspension. *Id.* at 1181. The district court vacated the award. The union in *Litvak* argued in the same manner as appellee here, that because just cause was not defined, it was within the arbitrator's authority to find that, even though sufficient cause for discharge existed, the dismissal of the employee was not "just" under the circumstances of the case. The court rejected this argument.

> To interpret the agreement as suggested by the defendants, however, would render meaningless the lengthy and specific elaboration of "sufficient" cause for discharge contained in article 6 of the agreement. The only rational purpose of the provision is to grant the employer an absolute right to terminate an employee for serious misbehavior, including . . . insubordination. . . .

Id. at 1182; *see also Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692, 694 (10th Cir. 1977).

The rationale as to why, when the employer has gained at the bargaining table the right to impose certain disciplinary action, the arbitrator has no right to determine the kind of disicplinary action has been expressed by the Fourth Circuit as well.

> The reservation of a right to either discipline or discharge for cause could be wholly ineffective and meaningless if the employer's action, pursuant to such right, is subject to review by an arbitrator on

> the basis of appropriateness. If the reserved right is construed to mean that the employer can take no disciplinary action in excess of a reprimand, except at its own risk and subject to severe penalties in case an arbitrator should later be of the opinion that some milder action is appropriate, the effect would be that employer's inherent right which has not been expressly relinquished by contract is no right at all.

Textile Workers Union v. American Thread Co., 291 F.2d 894, 899 (4th Cir. 1961). When the general just cause provision for discharge is coupled with a specific penalty provision, the appropriateness of the penalty is removed from consideration and is without the scope of review of the arbitrator. *See Morgan Services, Inc. v. Local 323, Chicago and Central States Joint Board*, 724 F.2d 1217, 1221-22 (6th Cir. 1984) (gathering cases).

If this arbitration award is to stand, the employer will lose in the arbitration process what it earned the hard way at the bargaining table. In the absence of Mill Rule 7(a), the employer's determination to impose the penalty of discharge would be subject to be reviewed by an arbitrator. By incorporating Mill Rule 7(a), however, the parties had the intention of allowing one of them, the employer in this case, to determine the nature of the punishment: the maximum of discharge on the first offense or no penalty. Otherwise, the parties would have remained mute and the pretention of this arbitrator as to interpretation of this clause would be valid. In the absence of this language, the employer could have discharged the employee and such action would had been subject to arbitral review. Then why incorporate Mill Rule 7(a)? We cannot accept that the parties did something with no meaning. Labor negotiators must also be given great respect because they are the real parties in interest and the ones that in the long run will suffer or benefit from their acts at the negotiating table. We

should not be inclined to conclude that what they agreed upon is ambiguous, for that would be splitting hairs to find a way to thwart the contractual will. On the contrary, we should find that the contract has a regular, logical meaning.

In this case, the parties have cooperated in the forging of their collective bargaining agreement and confirmed the right of manager to manage and to exercise discretion by discharging employees involved in drugs, believing that drugs in the workplace is affecting production, efficiency, quality, and plant safety. Management, with the negotiated concurrence of the union, determined that the drug scene creates a hostile and undesirable work environment that could not be tolerated. Discharge was stipulated, therefore as a penalty to be meted out by management. Under these circumstances, the imposition by the arbitrator of a punishment the parties did not bargain for does not draw its essence from the collective bargaining agreement and such a construction is not the one the parties bargained for.

III. PUBLIC POLICY

To examine the issue of public policy raised by the employer in perspective, we must consider the effect of the use of drugs in the shop and its effect on the safety of all employees.

A) *The relation of use of drugs to safety*

This is a paper mill where the employees, among other things, handle large, bulky materials and drive heavy machinery and trucks. The arbitrator concluded that "drug-dealing constitute[s] a danger to all employees' safety." One of the grievants, Kimberly Denis, admitted that smoking marijuana while working was dangerous. "I never smoked in the mill; it's a good way to lose your fingers." The arbitrator concluded that possessing or selling marijuana at work jeopardizes the safety of all

workers. The employer and union, in their notices to employees, stated that the use of drugs in the shop creates dangers and is unsafe. The union summarized the effect of the use of drugs in the shop in a newsletter: "The union can only hope that everyone will follow these rules and not jeopardize their job, their families, or the safety of their fellow workers." In connection with this statement, we are at a loss to see how the union insists on permitting employees known to be drug user and sellers to continue employment to the detriment of employees who do not use drugs. The union represents all employees, and the welfare of all employees should be paramount.

In view of the evidence and the conclusion of the arbitrator, we conclude that the use and sale of drugs in this shop is dangerous and constitutes a threat to the safety of all the employees. It also constitutes a violation of the state and federal law.

B) *Whether there is a well-defined public policy against the use of drugs in the workplace*

We must examine the facts in this context by examining the laws and legal precedent pertaining to illegal drug sale and use. We do so, mindful that particularly in the labor field, the Supreme Court has unequivocably stated that "the question of public policy is ultimately one for resolution by the courts." *W.R. Grace and Co. v. Local Union 759*, 461 U.S. 757, 766 (1983).

There are laws against the sale and use of drugs enacted by all states, including the State of Maine, and the sale and use of drugs is a serious offense under federal laws. *E.g.*, 21 U.S.C. § 841 (Supp. III 1985). Furthermore, the nation has focused on the corrosive consequences of drug sale and use and has devoted itself to their eradication. In particular, the work shop is a place where such usage is abominable not only because

of the health hazard it creates, but also because it creates an unsafe atmosphere and is deteriorative of production, the quality of the products, and competition.

We conclude that there is a well-defined public policy against the use of drugs in the workplace.

C) *The arbitration award and public policy*

The court cannot enforce arbitration awards that do not draw their essence from the collective bargaining agreement. *Enterprise Wheel & Car*, 363 U.S. at 597. The Courts vacate such awards as outside of the power of the arbitrator. Likewise, when the arbitrator's exercise of power, either inside or outside the scope of the collective bargaining agreement, contravenes explicit public policy, the court cannot stand idly by.

The Supreme Court had noted in a number of areas that an arbitration award should be vacated if the award is in "manifest disregard" of the law. *E.g.*, *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) (securities arbitration). Lower courts have vacated labor arbitration awards entered against public policy. *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984) (reinstatement of postal worker convicted of embezzlement vacated even though award did not violate a particular statute); *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982) (reinstatement of postal strikers who violated 5 U.S.C. § 7311 vacated), *cert. denied*, 459 U.S. 1200 (1983); *Teamsters Local Union 249 v. Consolidated Freightway*, 464 F. Supp. 346 (W.D. Pa. 1979) (award vacated when practical effect was to require truck drivers to violate state highway safety laws). *See generally*, Comment, *Employment at Will in the Unionized Setting*, 34 Cath. U.L. Rev. 979, 1004 (1985) (authorized by David L. Durkin).

The appellee union insinuates that in order to apply public policy, we must find a statute providing that possession and distribution of marijuana in the workshop of a paper mill is a crime punishable by a jail sentence. We do not believe the statute in question in any particular case must be so definite as applicable to any particular industry. This Circuit held that, although there was no specific statute to the effect that a postal employee could not steal postal money orders, to uphold the award would clearly contravene the general statute outlawing embezzlement. *Postal Workers*, 736 F.2d at 825. The penal statutes in the instant case treat all persons the same: no distinction is made for persons whose activities may endanger lives and property by their drug use. But, in both cases, when viewed in relation to the industry, these statutes acquired special import. The use of drugs in the case before the court created a dangerous situation that imperiled the safety of fellow employees. A hostile atmosphere developed where innocent workers were grouped together with "junkies." In *Postal Workers*, the violation of the law became an issue of public policy under less detrimental circumstances. In this more life threatening case, this court can do no less. This arbitration award cannot be enforced as a matter of public policy. *Cf Misco, Inc. v. United Paperworkers International*, 768 F.2d 739 (5th Cir. 1985) (enforcement denied to award reinstating paper mill employee who violated company rule against possession of marijuana on mill premises because award violated public policy), *cert. granted*, 107 S. Ct. 871 (1987) (No. 86-651).

The arbitrator refused to consider the plain meaning of the words that the parties agreed upon. Under these circumstances, the imposition by the arbitrator of a punishment the parties did not bargain for does not draw its essence from the collective bargaining agreement and such a construction is not the one the parties bargained

for. The linguistic legerdemain that this arbitrator performed was an attempt to garner more authority to herself than the parties agreed to give her. As such, she exceeded her authority. When the parties enshrined in the contract their intention that "violations of the following rules are considered causes for discharges: (a) possession, use or sale on mill property of intoxicants, marijuana, narcotics or other drugs," they meant just that, and the employer had the unhampered right to discharge.

In a separate appeal, consolidated with this case, the company has objected to the district court's denial of its motion under Fed. R. Civ. P. Rule 60, for relief from judgment. Given our resolution of the company's appeal from the district court's denial of the petition to vacate the arbitration award, the Rule 60 appeal is moot.

IV. CONCLUSION

For the above reasons, we reverse the judgment of the district court denying the company's motion to vacate the arbitration award and remand for further proceedings consistent with this opinion. The appeal from the denial of the Rule 60 motion is dismissed as moot.

Concurrence follows.

CAMPBELL, *Chief Judge* (concurring). Because the reasoning in Part II fully justifies the court's result, I see no occasion to reach the public policy argument set out in Part III. I therefore concur in the court's judgment and in the rest of its opinion, but I do not join in the public policy analysis found in Part III.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 85-0321-P

S.D. WARREN,

Petitioner,

v.

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO LOCAL 1069

Respondent.

CARTER, District Judge

OPINION

INTRODUCTION

In this action, S.D. Warren Company seeks to overturn, and the United Paperworkrs Union seeks to enforce, an Arbitrator's decision to reinstate three employees who were discharged by the Company. The employees, Kimberly Denis, Deborah Graham and Linda Willoughby, were discharged in connection with an undercover investigation conducted at the Company, for violation of a rule contained in the Collective Bargaining Agreement prohibiting the possession, use or sale of marijuana on mill property. The Arbitrator sustained the grievances of these employees and directed the Company to reinstate them with full back pay, seniority and benefits but imposed unpaid suspension of seven months, nine months and four months, respectively.[1] After re-

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[1] Marshall Buhelt, who was also a grievant in this proceeding, is now deceased. The Arbitrator denied his grievance and the Union did not seek to vacate the Arbitrator's decision.

viewing the submissions regarding the Company's Motion to Vacate the Award, the Magistrate issued a Recommended Decision finding that while enforcement of the Motion should be granted on the basis that the Arbitrator had exceeded her authority. Both parties filed objections to the Recommended Decision, the Union in regard to the Magistrate's determination that the Arbitrator had exceeded her authority, and the Company in regard to the Magistrate's finding that the award did not violate public policy. After reviewing the record, the Court has determined that it must enforce the Arbitrator's award.

STANDARD OF REVIEW

This matter is not a pretrial motion and it is dispositive of the parties' dispute. Therefore, in reviewing the Magistrate's Recommended Decision this Court must make a *de novo* determination upon the record under 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b). *See, e.g., Aluminum Company of America v. United States Environmental Protection Agency*, 663 F.2d 499 (4th Cir. 1981).

The standard under which a United States District Court may review an arbitration award is extremely narrow. In accordance with established policy, "[w]here parties to a collective bargaining agreement have provided for arbitration as the final and binding method for settling grievances the arbitration award is normally non-reviewable by a court." *Bettencourt v. Boston Edison Company*, 560 F.2d 1045, 1048 (1st Cir. 1977), *citing United Steelworkers v. Enterprise Wheel and Car Corporation*, 363 U.S. 593, 599 (1960) (herein *Enterprise Wheel & Car*). *See also* 29 U.S.C. § 173(d); 9 U.S.C. § 10. Therefore, a Court is bound to enforce an arbitral award unless the decision does not "draw its essence from the collective bargaining agreement." *W.R. Grace & Company v. Local Union 759*, 461 U.S. 757, 764, *citing Enterprise Wheel & Car*, 363 U.S. at 597.

In order to overturn an arbitration award, this Court must find, at a minimum, that the decision is "unfounded in reason and fact," "based on reasoning 'so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling,' " or "mistakenly based on a crucial assumption which is 'concededly a nonfact.' " *Bettencourt*, 560 F.2d at 1050 (citations omitted). Apart from matters specifically excluded by the parties "all of the questions on which the parties disagree must . . . come within the scope of the grievance and arbitration provisions of the collective agreement." *United States v. Warrior & Gulf Navigation Company*, 363 U.S. 574, 581 (1960) (herein *Warrior & Gulf*).

I. Did the Arbitrator Exeed Her Authority Under the Collective Bargaining Agreement?

The Collective Bargaining Agreement between the parties sets out a dispute resolution process at Article 12, Section 4. The disputes to be covered by this process are "differences . . . as to the meaning or application of the provisions of th[e] Agreement." The Agreement provides that, if such a dispute is not resolved by several levels of internal procedure.

> the matter may be referred by either party to an arbitrator for decision, but it is agreed that the matter thus referred shall be concerned solely with the interpretation on and]or application of th[e] collective bargaining Agreement . . . The decision of the arbitrator shall be final and binding on the parties.

The Agreement further states that "the arbitrator shall have no power to render a decision which in any way adds to, subtracts from, or modifies any provision of the Agreement."

The Agreement also includes a "Management Rights" clause which states:

> The Company reserves the sole right to manage the business of the Company and its Cumberland Mills operation and to direct the working force. This right includes but is not limited to . . . the right to select, hire, assign, promote, demote, transfer, discipline, suspend or discharge employees for proper cause or to relieve them from duties because of lack of work or for other legitimate reasons.

The Agreement includes an employees' seniority provision stating that mill seniority ends upon "discharge for proper cause." The final provision relevant to this case is Mill Rule 7(a), which is included in Appendix A of the Agreement. It states:

> 7. Causes for Discharge
>
> In any organization, certain rules of conduct must be observed by the members for the good of all.
>
> Violation of prescribed rules are cause for disciplinary action of varying degrees of severity.
>
> Violations of the following rules are considered causes for discharge.
>
> a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. The possession or use of a specific narcotic or drug properly prescribed by a licensed physician is the only exception to this rule.

The Arbitrator conducted a hearing in this case and found the following facts: In October 1983 Agent Timothy Berry was hired by the Company under name "Al" Berry as an entry-level employee at the mill. Agent Berry was, in fact, acting as an undercover agent for the State Police Drug Unit. That agency reached an arrangement with S.D. Warren, prior to Agent Berry's employment at the mill, that he would make himself

available to the Company for any administrative matter resulting from his work at the completion of the investigation. During this undercover operation, Agent Berry kept written reports which were eventually turned over to the Company and which formed the basis for the termination of twelve employees, including the grievants. The Reports disclosed, and the Arbitrator found to be proved beyond a reasonable doubt, that all three employees violated Mill Rule 7(a).

The Arbitrator found what might be termed "extenuating circumstances" in each of the three grievances she sustained. She found that Linda Willoughby was the first and only female employee out of fifty-two employees in the "winder room," and was under continual pressure from the men to do her work faster. The Award states that, after five years of working under these circumstances Ms. Willoughby was advised by the Company physician to take an extended leave. Upon return, she was diagnosed as suffering from anorexia nervosa and was enrolled in the Company's Employee Assistance Program, designed to assist employees with personal problems. The Arbitrator found that Ms. Willoughby was approached by Agent Berry eight to twelve times in the eight-to-twelve-week period she knew him, and approached an additional four times in her work area on January 30, 1984. Prior to the last approach on January 30th, she was reprimanded by her foreman in regard to Berry's repeated visits during a period of time when Ms. Willoughby was supposed to be working. On the last approach, the Arbitrator found, Willoughby took a bag from her pocket, gave Agent Berry a small amount of marijuana, about enough for one marijuana cigarette, refused payment, and told him to leave her alone. The Company terminated her employment for possession of marijuana. The Arbitrator found credible Ms. Willoughby's testimony that she never used marijuana at work, noting her service on the Safety Committee and that she had previously suffered a work injury.

The Arbitrator found that Kimberly Denis was the only female employee in her area and that, while any co-worker could make life difficult for her, she was especially dependent on her truck driver—for a period, Agent Berry—whose work could affect her bonus. The Arbitrator found that, after being approached three times, Ms. Denis agreed to try to get Agent Berry $20.00 worth of marijuana and to act as a "go-between," finding the marijuana for Berry from another employee at the plant. The Arbitrator stated, "Granted, Ms. Denis was in a vulnerable position. She was a woman half Berry's age working alone in an overwhelmingly male environment. She was in no position to risk alienating him, and she could not avoid him. But she had not exhausted her alternatives . . . " Arbitrator's Award (herein "Award") at 33.

The Arbitrator found that Agent Berry approached Deborah Graham six or seven times about drugs and that she was justified in concluding that reporting Berry would accomplish little other than making an enemy of someone she would continue to have to work with. The Arbitrator characterized her position as a "damned-if-you-do-damned-if-you-don't" situation. The Arbitrator found that Ms. Graham sold Agent Berry four grams of marijuana for $30.00.

The Arbitrator determined that, althought the employees had violated Rule 7(a), the Company was not justified in terminating their employment. In her conclusion, Arbitrator explained that she was imposing heavy, suspensions upon these three grievants in order to impress upon them the seriousness of their misconduct, but that in light of past disciplinary practice for similarly serious Mill Rule 7 violations, it was her determination that discharge was an excessively harsh punishment.

The Arbitrator rejected the Company's position that the plain meaning of the contract provides for immediate discharge in the instance of a violation of Mill Rule 7(a),

Award at 19, and found that the Company's decision to terminate these employees was subject to arbitral review. The Arbitrator found that the contract did not unequivocally state that the conduct listed in Mill Rule 7(a) was *proper* cause for discharge as required by the Management Rights and Seniority Provisions. She reasoned that, while Rule 7 is entitled "Causes for Discharge," it does not say whether such cause "*will* be" or "*may* be" grounds for termination. She found that the explanatory sentences following the Rule 7 heading heightened, rather than clarified, the ambiguity of the title (e.g., violation of prescribed rules are cause for disciplinary action of varying degees of severity," etc.). She further found that the Company's position was not supported by a reading of Mill Rule 7 in conjunction with Mill Rule 8. Mill Rule 8 states that certain violations, other than those listed in Rule 7, are "Causes for Discharge after Appropriate Warning." The Arbitrator found that Rule 8 simply *guaranteed* a warning before an employee could be terminated for violating its provisions. It did not make clear that a warning would never be the appropriate discipline under the contract for a violation of Rule 7.

The Arbitrator also found that the Company's Safety Policy handbook, albeit a unilateral statement of the Company, did not remove the ambiguity of the Agreement. The handbook states:

> . . . violations of rules printed in red *may* mean immediate discharge. Violations of other rules may be cause for discharge after appropriate warning.

(Emphasis added.) Language tracking both Mill Rules 7(a) and 8(a), the latter of which, according to the Agreement, requires at least a warning prior to discharge, are printed in red.

Consequently, the Arbitrator concluded that Mill 7 was ambiguous as to whether employees *must* be terminated and that it did not clearly state the agreement of the

parties as to what constitutes proper cause for discharge. Since she found that the Rule was not an expression of the parties' agreement on what constituted proper cause, the Arbitrator determined that it was not an express exemption from the arbitral review process set out in the contract.[2]

The Magistrate found that the Arbitrator's conclusion ignored the plain meaning of the Agreement and therefore recommended that this Court vacate the award. *See Hoteles Condado Beach, L.A. Concha and Convention Center v. Union de Tronquistas Local 901*, 763 F.2d 34, 41 (1st Cir. 1985) *quoting Detroit Coil Company v. International Association of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d 575, 579 (6th Cir. 1979) (an arbitrator is without authority to disregard or modify plain and unambiguous provisions). The Magistrate determined that through the Management Rights clause of the Agreement the Company reserved the sole right to discharge employees for proper cause, and that Rule 7 unequivocally makes clear that a violation of its provisions, including subsection (a), is adequate cause for discharge, despite the use of differing language. In recommending vacation of the Arbitrator's award, the Magistrate rejected the union's reliance on *Super Tire Engineering Company v. Teamsters Local Union No. 676*, 721 F.2d 121 (3d Cir. 1983), and *Kewanee Machinery Division v. Teamsters Local 21*, 593 F.2d 314 (8th Cir. 1979), which tended to support the Union's position that the Company's decision to terminate these grievants was subject to arbitration.

After careful consideration the Court has determined that under the appropriate standard of review, as articulated by the United States Supreme Court, the First Cir-

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[2] The Arbitrator further determined that past practice and bargaining history also did not support the Company's position that the meaning of the agreement plainly mandated discharge, and that the Company had not given sufficient notice of a change in policy.

cuit and other Circuit Courts of Appeals, this Court cannot accept the Magistrate's Recommended Decision to vacate the Arbitrator's award.

The issue here is whether, once the Arbitrator determined that the grievants had violated Mill Rule 7(a), she had authority under the contract to review the Company's chosen disciplinary action. It is the Court's task to determine whether the Arbitrator's construction of the contract provisions, and her resulting determination that the Company's penalty decisions are subject to arbitration, are contrary to the plain meaning of the contract.

The dispute resolution process in this Agreement covers "differences . . . as to the meaning or application of the provisions of this Agreement." Thus, the scope of the arbitration clause is broadly defined. In the context of ordering an employer to arbitrate a dispute, the United States Supreme Court has made clear that exclusions from the arbitration process must be specific and unambiguous.

> An order to arbitrate . . . should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage . . . "[S]trictly a function of management" must be interpreted as referring only to that over which the contract gives management complete control and unfettered discretion.

Warrior & Gulf, 363 U.S. 582-83, 584.

The Company argues that the parties have agreed, as evidenced by Mill Rule 7, that the conduct of the grievants in this case constitutes proper cause for discharge. The Union argues that the contract provides that such conduct *may* be proper cause. The Arbitrator resolved this conflict by concluding that Mill Rule 7 does not

unambiguously require dismissal or serve penalty decisions to the Company. *See supra* at 7-8. In her discussion of whether she had authority to reduce the Company's chosen penalty, the Arbitrator relied on her lengthy discussion of the ambiguity of the relevant contract provisions. She concluded that based on the ambiguity of Mill Rule 7, there was no express restriction in the Agreement limiting her authority under the arbitration clause. *Award* at 30.[3] Under these conditions, she stated "it is well established that . . . [an arbitrator] has the authority to fashion a lesser penalty[.]" *Id.* This Court cannot say her reasoning was "so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling." *Bettencourt*, 560 F.2d at 1050.

In fact, the Court of Appeals for the Eighth Circuit did reach similar results in *Kewanee* and *Super Tire*. Although the contract in *Super Tire* did not include the exact language of the "management rights" clause in this case, it did provide that the offense committed by the employee in that case would be "cause for dismissal." In *Kewanee*, in addition to construing a shop rule and a contract provision, the arbitrator in *Kewanee* construed "Management Rights" and "proper cause" provisions, both part of the contract, which were very similar to those presented in this case. The Eighth Circuit held that the arbitrator had authority to construe the Management Rights provision, reserving to the company the "sole right to . . . discharge employees" as subject to arbitral determination of proper cause. In contrast, in

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[3] This finding is predicated on a determination that Mill Rule 7 does not *require* the Company to discharge an employee who violates its provisions. The Arbitrator made such a finding based on her determination, *inter alia*, that the language of the Rule is ambiguous. *See supra* at 8. The same ambiguity which formed the basis for the Arbitrator's determination that the Rule does not require termination, provides the grounds for a finding that Rule 7 does not expressly remove a termination decision from arbitration.

Mistletoe Express Service v. Motor Expressmen's Union, 566 F.2d 692 (10 Cir. 1977), relied on by the Company, the contract specifically states that the parties had agreed, prior to the fact, on what conduct constituted "just cause" for termination, exactly the term employed in describing the Company's rights under the contract.[4]

In the instant case, the Court cannot vacate the Arbitrator's award because it would construe "cause " as equivalent to "proper cause," but must enforce the award if the Arbitrator's determination that the contract does not require dismissal or remove this issue from her jurisdiction is conceivably correct. In light of the conflicting authority on this issue, the Court must find that it is at least that.

II. *Does the Award Violate Public Policy?*

This Court accepts that portion of the Magistrate's recommendation (appended hereto as Exhibit "A") which concludes that the enforcement of this arbitration award does not violate public policy. In accepting the Recommended Decision, the Court also notes *Premium Building Products Company v. United Steelworkers of*

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[4] The Court notes that in the context of determining the ambiguity *ve non* of the contract, the Arbitrator stated that the Company, by choosing to retain discretion over discipline, gave "a third party neutral the same discretion when reviewing the propriety of those decisions." Award at 20. This statement, taken alone, is not necessarily correct. An employer may specify in a collective bargaining agreement that it has discretion over the degree of punishment warranted by employee violations and that such decisions are not subject to arbitral review (unless arbitrary and capricious). *See, e.g., Mistletoe*, 566 F.2d 692. However, this sentence does not invalidate the rest of the Arbitrator's analysis regarding the ambiguity of the contract or her reasoning that if Mill Rule 7 does not expressly provide that possessing or selling marijuana on the job is proper cause for discharge, it is not an express exemption from arbitration of the Company's termination decision. *See* Award at 30.

America, AFL-CIO, 616 F. Supp. 512, 516 (N.D. Ohio 1985) (court cannot establish an across-the-board ruling that public policy requires that anyone caught smoking marijuana at their workplace is subject to discharge in all cases), which was issued a few days prior to *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739 (5th Cir. 1985). In addition, the Court notes the dissenting opinion in *Misco*, 768 F.2d at 743 (Tate, J.).

Accordingly, the Company's Motion to Vacate the Award of the Arbitrator is hereby *DENIED*.

So *ORDERED*.

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, Maine this 2nd day of April, 1986.

EXHIBIT "A"

PUBLIC POLICY

If the district judge rejects the recommendation of the previous section that the arbitrator's interpretation of the contract is within her authority, such a conclusion would ordinarily end the matter and the arbitration award would be enforced. In a narrow class of cases, however, the courts have declined to enforce an arbitrator's interpretation of a contract because the contract as interpreted would be contrary to public policy. The United States Supreme Court has identified the standards for application of this narrow exception:

> If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obligated to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general consideration of supposed public interests."

W. R. Grace & Co., 461 U.S. at 766 (citations omitted). The Fifth Circuit Court of Appeals has applied this principle to deny enforcement of contract interpreted by an arbitrator to require reinstatement of an over-the-road tractor-trailer driver who admitted drinking liquor on the job. *Amalgamated Meat Cutters v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983). Federal Motor Carrier Safety Regulations explicitly prohibited the driver's conduct and required the employer to prevent it. This court, affirmed by the First Circuit Court of Appeals, declined to enforce a contract interpreted by an arbitrator to require reinstatement of a postal employee who admitted embezzling over $4,000 worth of money orders. *U.S. Postal Service v. American Postal Workers*

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[8] If the recommended decision is accepted, the motion to strike affidavits is moot since they are not pertinent to the issue decided, but go to the Arbitrator's conduct of the hearing.

Union, 736 F.2d 822 (1st Cir. 1984). In that case, the First Circuit pointed to several federal statutes exemplifying a federal policy regulating the conduct of postal employees and protecting the public in its use of the postal service. In *Local 453 v. Otis Elevator Company*, 314 F.2d 25 (2d Cir. 1963), on the other hand, the court enforced a contract interpreted by an arbitrator to require reinstatement of a company employee who had violated a company rule against gambling on the premises and who was convicted of a misdemeanor. The court found that the public policy represented by the New York statutory prohibiiton was vindicated by the criminal conviction and further vindicated by a 7-month uncompensated layoff upheld by the arbitrator. The court found that no "greater vindication of the public condemnation of gambling" was required. 314 F.2d at 29.

The issue in these cases is most specifically *not* whether the court approves the employee's conduct or the arbitrator's remedy ordering reinstatement, but whether enforcing a contract between the parties that requires such reinstatement (for the arbitrator's decision is the binding interpretation of what the contract requires) violates an "explicit," "well defined and dominant" public policy exemplified by "laws and legal precedents." *W. R. Grace & Co., supra.*[9]

In that connection, Maine State law provides that possession of a "usable" amount of marijuana is a civil violation, subject to a fine of up to $200. 22 M.R.S.A. § 2383. Trafficking and furnishing, which in this case would amount to selling or giving away the marijuana, are Class D crimes, 17-A M.R.S.A. §§ 1103(2)(C), 1106(2)(B), subject to imprisonment for less than one year

[9] The Union attempts to have the court consider the conduct of the police undercover operation in its analysis of public policy. That conduct, however, plainly has no bearing on whether enforcement of the collective bargaining agreement, as interpreted by the Arbitrator, is contrary to public policy.

and a fine of up to $1,000, 17-A M.R.S.A. § 1252(2)(D), 1301(B). Under federal law, possession is a misdemeanor with a penalty of imprisonment of not longer than one year, a fine of $5,000 or both, 21 U.S.C. § 844(a). Sales are felonies with penalties of up to five years imprisonment, up to $50,000 in fines, or both, 21 U.S.C. § 841(b)(1)(C), but a first offender possessing or distributing a small amount may avoid an adjudication of guilt and obtain probation for not longer than one year, 21 U.S.C. §§ 841(b)(4), 844(b)(1).

Thus, state and federal law provides only light penalties in connection with possession, furnishing, or distributing a small quanity of marijuana as is the case here. In Maine, possession is not even criminal, but a civil infraction. As a matter of federal law, if it is a first offense, an adjudication of guilt can be avoided. It is clear, moreover, that the policy of these statutes is directed to the public at large, not as in the *Amalgamated Meat Cutters* case to the specific category of over-the-road truckdrivers or as in the *U.S. Postal Service* case to the specific category of postal employees. Although the public policy of discouraging marijuana usage is clear, these statutes do not demonstrate a clear public policy preventing a company from agreeing with a union that it will discipline employees with lengthy periods of unpaid suspension but not outright dismissal if they violate a company rule on the subject.

I recognize that this conclusion is contrary to the decision reached recently by the Fifth Circuit Court of Appeals in *Misco, Inc. v. United Paperworkers International Union*, 768 F.2d 739 (5th Cir. 1985).[10] There, the court declined to enforce an arbitration award interpreting the collective bargaining agreement to require

[10] *Misco* failed even to cite the *W.R. Grace* decision and based its analysis solely upon that provision of *Amalgamated Meat Cutters* which dealt with the danger of the truckdriver's conduct rather than the specific laws which had been violated.

reinstatement of an employee found in possession of marijuana and in the atmosphere of marijuana smoke in another person's car on the company lot. The court found the award to be "against well defined public policy—the Louisiana law against possession of marijuana and the public policy, embodied in the employer's rule, against introduction of drugs into the workplace and consequent operation of dangerous machinery by persons under their influence." 758 F.2d at 741. With all due respect to the Fifth Circuit's conclusion, I believe it fails to follow the standards set forth in *W.R. Grace*, *supra*. As stated in *Muschany v. United States*, 324 U.S. 49, 66 (1945) (a case referred to in *W.R. Grace*, *supra*), "[a]s the term 'public policy' is vague, there must be found definite indications in the law of the sovereignty to justify, the invalidation of a contract as contrary to that policy." Thus, even though there may be a general state law against marijuana possession or usage, that does not demonstrate a well defined and dominant explicit public policy to prevent employers from agreeing that they will discipline their employees who violate that law in some way other than outright termination. *Misco*'s description of the risks to workplace safety when the dangerous machinery involved in that case and this case is used by those under the influence of drugs or alcohol involves "general consideration of supposed public interest" rather than the expliict laws and legal precedents required by *W.R. Grace*. The parties here have not cited the court to any statutory or regulatory statements requiring termination of employees like these. Indeed, Rule 8 of the Agreement, which is not challenged here, clearly provides that the Company has explicitly agreed to give a warning to an employee who reports to duty *under the influence* of alcohol or narcotics rather than immediately terminate him or her. If a court's analysis of workplace safety is to govern the outcome, a court would have to be prepared to invalidate the explicit discipline provided by a rule like Rule 8 since an employee under the influence

is far more imminently dangerous to workplace safety than the incidents here. Other caselaw from the Fifth Circuit has recognized that the duty or public policy of providing a safe workplace is not alone sufficient to justify a court in voiding a collective bargaining agreement as interpreted by an arbitrator. *Johns-Manville Corp v. International Ass'n of Machinists*, 621 F.2d 756 (5th Cir. 1980.)

I, therefore, conclude that the contract as interpreted by the Arbitrator is not contrary to public policy.[11]

DATED at Portland, Maine, this 17th day of January, 1986.

/s/ D. Brock Hornsby
D. BROCK HORNSBY
United States Magistrate

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[11] I would reject the Company's argument, Petition for Vacation of Award of Arbitration, ¶ 15, that the award must be vacated because "the Arbitrator refused to accept and consider relevant judicial precedent published after filing of post hearing briefs with the Arbitrator (and also refused to consider S.D. Warren's reply brief). . . ." The Arbitrator like a court, must be able to invoke cloture on proceedings so that she may issue a decision.

I have not addressed the argument whether the Arbitrator improperly declined to consider certain evidence or whether she properly interpreted the so-called *Greenlaw* award, a previous arbitral decision involving the Company and the Union.

APPENDIX E

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

Case Number: 1130-0908-84

IN THE MATTER OF THE ARBITRATION BETWEEN
S. D. WARREN COMPANY
CUMBERLAND MILLS

—and—

UNITED PAPERWORKERS INTERNATIONAL UNION
AFL-CIO, CUMBERLAND MILLS LOCAL 1069

AWARD OF ARBITRATOR

The Undersigned Arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated June 1, 1983 and having been duly sworn and having duly heard the proofs and allegations of the Parties. AWARDS as follows:

The grievances of Kimberly Denis, Debra Graham and Linda Willoughby are sustained. The Company is directed to reinstate each of them with full back pay, seniority and benefits, minus interim earnings, if any, and minus pay for nine months in the case of Ms. Graham, seven months in the case of Ms. Denis, and four months in the case of Ms. Willoughby. The latter deductions shall stand as unpaid suspensions on their records. The Arbitrator shall retain jurisdiction with respect to the remedy for a period of three months from the date of the Award.

The grievance of Marshall Buhelt is denied.

/s/ Suzanne Butler Gwiazda
Arbitrator's signature (dated)
SUZANNE BUTLER GWIAZDA
September 19, 1985

STATE OF)
) ss.:
COUNTY OF)

On this day of , 19 , before me personally came and appeared to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

S.D. WARREN COMPANY
CUMBERLAND MILLS

—and—

UNITED PAPERWORKERS INTERNATIONAL UNION
AFL-CIO, CUMBERLAND MILLS LOCAL 1069

ARBITRATION OPINION & AWARD

AAA #1130-0908-84

Grievance 84045 (Denis); 84048 (Willoughby); 84049 (Graham); 84058 (Buhelt)

Dated: September 19, 1985

The undersigned Arbitrator, designated by the American Arbitration Association pursuant to the terms of the above-named parties' June 1, 1983 Collective Bargaining Agreement, held hearings in Westbrook, Maine on February 1, April 12 and 13, May 1, 2, 3 and 20, and June 21, 1985. Witnesses were sworn. The undercover agent testified under subpoena. Post-hearings briefs were submitted by both parties, and the record was declared closed August 12, 1985. The parties agreed to a sixty-day deadline from the close of the record for the issuance of the Award.

APPEARANCES:

Counsel for the Company:

S. Mason Pratt, Esquire
Pierce, Atwood, Scribner, Allen, Smith & Lancaster

Counsel for the Union:

Stephen Sunenblick, Esquire
Sunenblick, Fontaine & Rubin

Attending Counsel for the Maine State Police Department:

Chris Katucki, Esquire

Witnesses for the Company:

Peter Malia, Industrial Relations Manager
Bedford C. Hayes, Director of Safety & Security
Roger A. Barr, Benefits Manager
Timothy A. Berry, Undercover Agent
Gary Snow, Lieutenant, Maine State Police
William B. McClaran, Professor, Law Enforcement Technology
Judson Smith, Ph.D., Clinical Psychologist

Witnesses for the Union:

Kimberly M. Denis, Grievant
Debra M. Graham, Grievant
Linda S. Willoughby, Grievant
William Carver, President, Local 1069
Daniel Parks, Recording Secretary, Local 1069
Brian Williams, Chief Steward, Local 1069
Gary Cook, International Representative
John Bishop, Ph.D., Clinical Psychologist
James Lyna, Employee Assistant, Maine Workmens Compensation Commission

THE ISSUE:

The issue agree-upon for submission is:

"Did the Company violate the Collective Bargaining Agreement in discharging the Grievants, Marshall Buhelt, Kimberly Denis, Debra Graham and/or Linda Willoughby? If so, what shall be the remedy?"

THE AGREEMENT:

The June 1, 1983 Collective Bargaining Agreement provides in pertinent part (JX 1):

> ARTICLE 4 MANAGEMENT RIGHTS
>
> The Company reserves the sole right to manage the business of the Company and its Cumberland Mills operation and to direct the working force. This right includes but is not limited to the right to . . . demote, transfer, discipline, suspend or discharge employees for proper cause. . . .
>
> APPENDIX A COMPANY POLICIES AND MILL RULES
>
> 7. *Causes for Discharge*
>
> In any organization, certain rules of conduct must be observed by the members for the good of all.
>
> Violation of prescribed rules are cause for disciplinary action of varying degrees of severity.
>
> Violations of the following rules are considered causes for discharge:
>
> a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. The possession or use of a specific narcotic or drug properly prescribed by a licensed physician is the only exception to this rule.
>
> b) Smoking upon Company's premises except in authorized smoking areas, as provided under "Smoking."
>
> c) Unauthorized destruction or removal of the Company's property.
>
> d) Refusal to comply with Company rules.
>
> e) Willful disobedience or insubordination.

f) Neglect of duty.

g) Disorderly conduct.

h) Dishonesty.

i) Obvious sleeping on duty.

j) Deliberate waste of Company time and/or material.

k) Leaving the Mill while on duty except by permission of Foreman . . .

l) Violation of certain safety rules specifically noted in the Mill Safety Rules.

m) Incarceration, after being sentenced.

n) Giving or taking a bribe of any form to obtain work, retain a position, or obtain any preferential treatment whatsoever.

8. *Causes for Discharge After Appropriate Warning*

a) Reporting for duty under the influence of alcohol or narcotics.

b) Reading unauthorized material while on duty.

c) Repeated failure to report for duty without good and sufficient reason.

d) Failure to report injuries to Foreman, and when so instructed to Medical Department.

e) Habitual lateness in report for work.

f) Failure to wear and/or use prescribed protective clothing, devices or equipment.

g) Failure to follow safe work practices.

COMPANY SAFETY POLICY AND STANDARDS:

26. *Intoxicants—Liquor or Drugs*

a. *Bringing in or consuming liquor or drugs on Company property is absolutely forbidden.*

b. *An employee will not report to work under the influence of alcohol or drugs.*

c. If an employee is suspected of being under the influence of liquor or drugs, the Company may require a medical examination by the mill physician. Note: Those employees who may have a problem in this area are encouraged to seek assistance through the Employee Assistance Program.

BACKGROUND:

On February 15, 1984, S.D. Warren Company's Cumberland Mills in Westbrook, Maine (hereinafter "the Company") announced the termination of twelve employees for violation of the contractual rule against possession, use or sale of alcohol or drugs in the mill (Appendix A, Section 7(a), hereinafter "Mill Rule 7(a)"). Among those discharged were the four grievants in this case: Kimberly Denis, Debra Graham, Linda Willoughby, and Marshall Buhelt (deceased in May, 1985). Briefly summarized, the events which led up to the discharge action were as follows:

Sometime in 1982, rumors of drug activities in the mill came to the attention of the Company and U.P.I.U. Local 1069 (hereinafter "the Union"). Both parties were concerned. The Company approached local and federal investigative authorities before it succeeded in gaining the cooperation of the Organized Crime and Drug Anti-Smuggling Unit of the Maine State Police Department (hereinafter "the State Police Drug Unit").

On March 29, 1983, Lt. Gary Snow, Commanding Officer of the State Police Drug Unit, informed the Company by memorandum that a "mutual commitment" had been reached to fund a six-month investigation at the mill using an undercover agent who would be under the

direct supervision of the State Police, but who, "upon completion of the investigation, . . . would make himself available to the S.D. Warren Company for any administrative matters that resulted from his work." (JX 7)

On or about October 10, 1983, Timothy Berry was hired under the name "Al" Berry to work as an entry-level employee in the mill while acting as an undercover investigator of drug and alcohol activity among mill employees. Agent Berry had been in police work since 1974 as a patrolman or as Chief of Police in South Berwick, Maine. He had received some training in drug investigation at the Criminal Justice Academy and, before he commenced the S.D. Warren investigation, he took a two or three-week course in undercover operations. When he began working at the mill, he told co-workers that he was single or divorced, that he loved to party and "get high." He made a point of asking as many people as possible where he might find "weed" or other drugs. Where he received the impression that the person had no knowledge whatsoever, he left that employee alone and continued to pursue those whose replies gave him to believe that they might lead him to the information he sought. He was transferred to different areas of the mill to facilitate his efforts, but very few people in management knew that he was an undercover agent, and Union leaders were not informed on grounds that knowledge would put them in an awkward position vis-a-vis their membership.

In November, Agent Berry began making marijuana transactions in the mill with the four grievants in this case. Specifically, on November 3, 1983, he obtained ⅛ ounce from grievant Denis. On November 13, he obtained 5.5 grams from grievant Buhelt. On December 3, he obtained four "joints" and simulated smoking one of them with grievant Buhelt. On January 12, 1984, he obtained 2.6 grams from grievant Graham. And on

January 30, 1984, he obtained one "joint" from grievant Willoughby. Agent Berry attested that he wrote an account of each transaction after work that evening and kept the marijuana obtained in a briefcase in his car until he submitted it to the state laboratory for analysis. Eventually, his written reports were given to the Company where they formed the basis for the discharges. (CX 9-14)

Following agent Berry's testimony, the Company called the three living grievants. Although each differed with certain details in Berry's account of their behavior, suffice it to say here that all three conceded that they did provide marijuana to him in the mill and that they knew it was a dischargeable offense under Mill Rules. Their explanations were essentially similar—i.e. that each was the only female worker in her area of the mill, that "Al" Berry was exceptionally sympathetic and helpful to her (unlike many of the other men with whom she had to work), that he was the first to bring up the subject of marijuana, that he talked about it incessantly to the point where each concluded that maybe if she satisfied his persistent requests, he would leave her alone. All three denied bringing marijuana into the mill for their own use or to using it there themselves.

One employee, not among the twelve discharged, Brian Williams, attested that "Al" Berry asked him about marijuana perhaps as many as ten to twelve times in a two-week period in February of 1984 in spite of his (Williams') "definite no" response each time. One night he saw Berry run his platform truck into a ramp post, flipping it over and throwing Berry to the floor. He said that Berry got up holding his chest as if he were in pain but, when asked if he was alright, Berry responded that he would be "as soon as he got some more 'wacky-tobaccy' in him." When Berry was offered some coffee, he asked if there weren't "something stronger," but Williams laughed it off assuming Berry was joking.

There was considerable expert testimony given at the arbitration hearing surrounding the behavior of agent Berry while he was working under cover and the response of the grievants. Briefly, Company witnesses with extensive police experience, Lt. Gary Snow and William McClaran, attested that it is standard operating procedure for an undercover investigator to color himself in ways intended to mislead, and that in their opinion, agent Berry's friendly persistence in the mill did not amount to entrapping behavior. Similarly, Company witness psychologist Dr. Judson Smith, reviewing agent Berry's written reports, concluded that the grievants all perceived Berry as a peer (not as an authority figure) and that all were free to refuse his requests for "weed" if they wanted to. Where grievant Buhelt was concerned, he noted that "if *any*one was 'entrapped,' it was Berry, not Buhelt."

Expert testimony for the Union differed. Dr. John Bishop, psychologist, opined that the female grievants were not as "free" as Dr. Smith would have the Arbitrator believe. Citing the well-known Yale "Milgram Studies," he noted that each grievant was working alone surrounded by male employees and that each could hardly help feeling grateful and somewhat beholden to agent Berry, an older man who was exceptionally helpful. Just as conditions in the experimental laboratory conspired to induce the Milgram subjects to administer potentially lethal shocks to a stranger, these working conditions, in his opinion, induced the women grievants to comply with Berry's persistent requests for cooperation. He doubted that under "normal" conditions, any of them would have behaved the same way.

It is agreed that the parties jointly administer an Employee Assistance Program (hereinafter "the EAP") which is designed to refer employees with personal problems, including drug or alcohol abuse, to medical and counseling services on a confidential basis. Designated

Union leaders and management officials act as EAP coordinators. The program brochure emphasizes the voluntary nature of the program and warns that (UX 2):

> "If you have a problem and don't seek help from EAP, you will be judged the same way all employees are judged; on the basis of job performance, attendance, tardiness, and other established mill rules and standards."

Whereas the EAP is primarily a voluntary program, many employees during the past ten years have been required to enter it on a "last-chance" basis where their work performance warranted discharge, but it was hoped that they could correct the underlying problem—often alcohol or substance abuse. The particular performance problem took various forms, but the most common was absenteeism, and the current Agreement contains a specific provision (Appendix A, Section 27, Mill-Wide Absentee Control Procedure) where compulsory EAP counseling begin after six incidents of absenteeism in twelve months.

The Facts With Respect to Kimberly Denis

Grievant Denis was hired on or about December 17, 1980, shortly after she graduated from high school. She attested that she grew bored with truck driving and wanted to make more money. Eventually she persuaded management to let her try a job no woman had held permanently before—that of the Second Hand in the Release Department working on #35 stack. She liked it and stayed on, sometimes making $66 to $88 a week in bonus. Except for a woman truck driver, she was the only female employee working in the area. She described her relationship with male co-workers as generally amicable, although one fellow employee "stuffed her cig" with a firecracker which blew up in her eyes, and several of her partners were difficult to get along with. She noted that any co-worker could make life miserable for her, and she

was especially dependent on whomever was her truck driver insofar as the driver could select good or bad rolls of paper to bring to her, and bad rolls would reduce her bonus.

Sometime in October, 1983, agent Berry was assigned to the position of truck driver in Ms. Denis' department, and he met her delivering rolls to her work station. It was Mr. Berry's testimony that in their various conversations he asked her "what she was on" because she appeared to be "high." She told him she had been smoking marijuana all day. He asked her if she had any on her or if she knew where he could get some. According to Berry, Ms. Denis replied that she did not have any with her, but she would get him some if he would give her some money. He gave her $20.00. When she said the next day she couldn't get any until Saturday, he said he wouldn't be around Saturday and asked if she knew anyone else in the mill from whom he could get it. She said she did, took the money, and went towards the Coater Cutter Room. A few minutes later, she returned and said she'd have the marijuana for him in a while. When he asked later, she said she had put it inside the core of a roll which she pointed out. He reached in and pulled out a small bag of marijuana wrapped in a paper plate. He pocketed the bag and kept it in his automobile until he submitted it to the Maine State Chemist for testing. After work, he wrote an account of the transaction and submitted it for review and typing by the State Police Drug Unit. (CX9)

Grievant Denis denied that she "possessed," "sold," or "gave" marijuana to agent Berry in the mill. She attested that Mr. Berry asked her at least three to five times if she could get him some marijuana before she accepted $20.00. Before that she kept replying, "maybe" or, "I don't know." Then she kept telling him she would try (although she didn't try) or that she just hadn't gotten it. She kept offering him back the $20, but he

wouldn't take it. She acknowledged calling her boyfriend, but denied using the word "supplier" or having a supplier as such.

Eventually, Ms. Denis attested, Mr. Berry asked if she knew Miller Hunt. When she said yes, he asked if she would take $10.00 to Miller and ask if Miller would sell some weed to him (Berry). Ms. Denis said she went over to Hunt in the Coater Cutter Room and asked if he'd sell Berry $10 worth of marijuana. Hunt said yes; he'd come over later. Subsequently Hunt told her he had put the marijuana in a roll wrapped in paper. When Berry asked her about it, she pointed towards the roll, saying she believed it was there.

Ms. Denis could not deny ever using marijuana privately, but she denied using or selling it in the mill. She said she felt pressured by Berry because he was "always bugging me; what could I do?" In addition, Berry had been exceptionally nice to her, bringing her good paper rolls, and coffee, and hamburgers when she was too busy to get lunch. They would even "bum butts" from each other. She rejected his suggestion that they go out socially, however, on grounds she had a boyfriend, and she declined his request for her phone number and his suggestion that he might get marijuana from her boyfriend. Frequently they would arrive simultaneously and would walk in to work together. When he became her "roll man," or truck driver, he would help her peel bad rolls or to manage a big roll. Since he was so helpful, she naturally wanted to "stay on his good side."

Ms. Denis recalled further that agent Berry asked her four or five times to smoke marijuana with him—twice in the mill, the rest outside. She refused on all occasions, she said, telling him that she didn't smoke in the mill. These suggestions were occurring about the same time she had his $20.00. She was being seen talking to him so much, people were asking if she was going out with him, but she didn't want to alienate him by rejecting his

friendship. "If I wasn't nice to him, he could be hard on me. Like a lot of men do—sit and laugh. Some have pulled out tickets, and I'd think it's a good roll, but then it would stave up the machine."

Agent Berry stated that he did not know Miller Hunt on November 3, 1983; it was Ms. Denis who mentioned his name and later introduced him. He called that Denis looked pale, had bloodshot eyes on occasion, and she *said* she'd been smoking pot all morning. He denied asking her out for a drink (she asked him instead) and said buying coffee for fellow workers was commonplace. As to how many times he asked Ms. Denis about marijuana, he never counted, but it was "perhaps two or three times."

The Facts With Respect to Debra Graham

Grievant Debra Graham was hired by the Company on August 22, 1983. She first met agent Berry sometime in October, 1983 while they were working in the Material Handling Department. It was agent Berry's testimony that on January 12, 1984, Ms. Graham approached him saying she'd heard he'd been trying to buy some marijuana; she had some on her, and did he want to buy any? He said yes, and together with a male co-worker, they went down the hallway to make the transaction. According to Mr. Berry, Ms. Graham took a bag from her purse and said she wanted $7.00 a gram. He said he wanted four grams and had only $30.00 with no change, so she should keep the extra $2.00. He purchased four grams[1] and submitted the marijuana with his written report to the State Police.[2] (CX 12)

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[1] The state chemist receipt indicates that 2.6 grams were received on January 16, 1984. There is no evidence with regard to this disparity.

[2] Agent Berry attested to a second purchase of marijuana from Debra Graham on January 20, 1984. It is clear from the testimony and the report (CX 13), however, that transaction took place off mill property, and the Union's objection to the admission of evi-

Grievant Graham denied approaching agent Berry first. It was her testimony that Berry approached her, that she gave him the entire amount, not part, and that she did not put "the rest" back in her change purse as his report indicated. She said she brought the marijuana in to work because he had asked her about it "25 or 30 times" in the time she had known him and she had begun to feel guilty about not cooperating. She said he talked about it repeatedly, although she admitted that she talked about it too. He asked her about the quality of her weed, and she told him "it was just as good as his." But, she said, "I put him off for a long time. I felt bad about it because he'd buy me coffee three or four times a day and he helped me trig rolls. He was very nice—an alright guy, I thought."

The Facts With Respect to Linda Willoughby

Grievant Willoughby was hired by the Company on April 20, 1977. Shortly thereafter, she began working as a Roll Handler in the Winder Room—the first and only female employee in that job. It was Ms. Willoughby's testimony that eventually being the only woman out of approximately fifty-two (52) employees in the Winder Room began to wear on her. In addition to teasing banter, she was under continual pressure from the men to bring them rolls faster. By 1982 she "couldn't take it anymore," and she consulted the Company physician, Dr. Earnhardt, who advised her to take an extended leave somewhere quiet, that "her job would wait for her." He asked if she had anywhere like that to go, and she said she had friends in Jamaica. Shortly thereafter she requested sick leave, and she spent approximately five months in Jamaica recuperating. She was living a distance from Kingston, but she saw a Kingston doctor as required by Company rules and gave him the necessary

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dence regarding this transaction is sustained. The Agreement prohibits possession, use or sale on mill property—not on public streets.

paper to forward to the Company. Evidently he did not do so, and suddenly she received notice that she had been terminated. When she tried to locate the Kingston doctor, he had left for another island. Finally, she returned to Maine, explained her circumstances, and the Company reinstated her on condition that she participate in the EAP program. (CO X 19) She felt rested from her leave, but she returned to work seriously malnourished and underweight, having lost fifty pounds in Jamaica. Seeing Dr. Leavitt pursuant to the EAP program, she was told she was suffering from anorexia nervosa.

Ms. Willoughby returned to work in July, 1983. It was her testimony that she "worked in her own corner of the world," had only one close friend in the mill with whom she might discuss marijuana "once a month at most," and was generally too busy to have much social contact with other employees. She said she first met Berry in "DIC Park" in November, 1983 and after that she ran into him almost daily. He brought her coffee, said how nice she looked, helped her roll paper. She recalled that he was friendly, that he "just talked about drugs, parties, how he enjoyed his alcohol and drugs. He asked me many times if I could get weed for him. About once a week, did I have any? Could I get any? I said no."

It was agent Berry's testimony that he asked Kimberly Denis one day if she had any marijuana, and she said no, but Linda Willoughby in the Winder Room might. Mr. Berry said he went to the Winder Room and asked Linda if she had any, but Linda said she was "busy," and he should "come back later." He did return later, and she gave him enough for one cigarette. Berry said he offered to pay for it, but she waved him off. As with all his transactions, agent Berry submitted the material bought and his report to the State Police. (CX 14)

Grievant Willoughby admitted that she gave a small amount of marijuana to Berry at the mill on January 30, 1984. She disagreed with Berry's written report on several points, however. She recalled that he came to her in the Winder Room five times, not there, as indicated. She denied that the marijuana was in her pants pocket or that she had a quarter ounce on her. Instead, she said, it was in an envelope in her pocketbook, and she gave all of it to Berry; in fact she had brought it in specifically for him on the theory that maybe if she gave it to him, he'd leave her alone. There was no "bag" containing "the rest."

Ms. Willoughby recalled the sequence of events on January 30, 1984 as follows: Berry came to her in the Winder Room at the beginning of the tour saying he'd been working for sixteen hours and wanted a joint to get high. Did she have any weed? Ms. Willoughby said she replied that she didn't know and she was "busy." In fact her job as Material Handler in the Winder Room was often hectic, and she had trucks to unload. He returned about an hour later asking again. She said she was busy and didn't have any. He returned again an hour later, and she said again that she was busy. The fourth time was about 45 minutes later. She said she was busy. Then the foreman asked her why this guy was coming over to her so often; didn't she have any work to do? She told the foreman, Don't worry. I'll take care of it." When Berry returned a fifth time, she decided she couldn't afford to have him return again, so she went to her pocketbook and gave him enough for one cigarette. When he offered her money, she said she didn't want his money; he could reciprocate some time. But she didn't have time to get weed for other people and he should "*leave me alone!*"

Asked if she hadn't encouraged Berry by saying she was busy and he should come back later, Ms. Willoughby attested that she was hoping that he would get the hint

or forget about it. She said that since her return from Jamaica, she had been trying to get control of her life—which included learning to handle pressures at work. She knew how difficult male employees could make life for her at the mill, and she didn't want to alienate Berry who seemed exceptionally nice. Although she was technically still on the EAP program, she wanted to make her own decision and did not discuss with her EAP counselors Mr. Berry's requests for marijuana. Asked why she didn't tell Berry to see her after work. Ms. Willoughby stated that she had felt herself the object of substantially greater male interest since she returned to the mill fifty pounds thinner, and she was afraid Berry would misconstrue such a suggestion as an interest in dating him.

The Facts With Respect to Marshall Buhelt (deceased)

Grievant Marshall Buhelt was hired by the Company on or about June 19, 1979. It was union president William Carver's testimony that Buhelt worked in his area of the mill for a period where he had a poor work record and an obvious substance abuse problem. Mr. Carver testified that he and a shop steward together urged Buhelt to enroll in the EAP program, but he "just shrugged it off." Later, Buhelt left Carver's work area for other parts of the mill, and Mr. Carver knew little about him except that he was continually filing grievances on safety issues and "seemed always to be in trouble with someone."

Agent Berry met grievant Buhelt in November, 1983 where Buhelt was working as a roll handler in the #3 calendar area of the mill. It was Berry's testimony that Buhelt sold him marijuana on mill property twice, the second time insisting that he (Berry) share one of the joints before he left. Agent Berry drafted a written account of each transaction the same day as it occurred, submitting the report and the marijuana purchased to state authorities as standard procedure. (CX 10; 11)

According to the Union, grievant Buhelt died in May of 1984, a few months after his discharge.

Summary

On February 15, 1984, all four grievants were arrested by the State Police. On the same day, they were terminated by the Company, and the Union was informed of the undercover investigation and the transactions engaged in by the twelve employees being discharged.

The Union grieved the discharges and, failing to resolve them through the step procedure, appealed to arbitration. The present Arbitrator was selected to hear the four grievances herein. A pre-hearing conference was held on February 1, 1985 at which various procedural problems were discussed including the Union's objections to testimony by the undercover agent, on grounds that such testimony would violate certain state confidentiality regulations governing police records. This objection was overruled, and the undercover agent was subpoenaed by the Arbitrator.

The hearings extended over many days from February to June of 1985. Both parties had full opportunity to present evidence, examine and cross-examine witnesses,

The matter is now properly before the Arbitrator for decision.

THE POSITIONS OF THE PARTIES:

The Company

It is the position of the Company that the discharges in this case were all for proper cause, and no violation of the Agreement occurred. The Company contends that all four grievants clearly violated Section 7(a) of the Mill Rules in the Agreement; the three living grievants

(Denis, Graham and Willoughby) admitted it, and deceased grievant (Buhelt) was proved to have done so.

The Company asserts that the Agreement is clear and unambiguous with respect to the penalty for violation of Mill Rule 7(a), and the Arbitrator is without authority to reduce the penalty if a violation is found. In this case, the Company asserts, "once a violation of Mill Rule 7(a) is established, a discharge for violation of that rule must be upheld because of the plain meaning of the contract, past practice, bargaining history and public policy." (Co. Brief p. 5)

None of the grievants were eligible for participation in the EAP program, the Company maintains. The EAP is not a contract right; it is a voluntary program for people who need treatment. None of these grievants (with the possible exception of Buhelt) showed signs of needing treatment for substance abuse. Nor were they terminated for drug abuse; they were terminated for drug *possession and sale* on mill property. There is no evidence the EAP program was ever offered to any employee after he or she was found dealing in drugs in the plant. In fact, this is "a case of first impression" insofar as no employee has ever before been charged with violating Mill Rule 7(a). Moreover, the Company contends, the grievants and the Union were well aware of Mill Rule 7(a). The Union actively supported the no-drugs policy by reminding its membership of the Rule and the penalty of discharge for violating it. In additon, after the *Greenlaw* Arbitration Award [3] issued, the Company "republished its intent . . . to enforce its right to immediate discharge . . ." by posting two notices to that effect, on October 3 and December 10, 1982.

It is the Company's contention that its cooperation with the Maine State Police investigation was reasonable and

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[3] *S.D. Warren Co. and U.P.I.U. 1069*, Arbitrator Lawrence Katz, April 2, 1984. AAA 1130-1175-82.

in good faith insofar as the Company's concern about drug dealing in the mill was grounded in safety considerations and in undercover operation is both more effective and less intrusive than alternative investigative methods such as search and seizure. As to agent Berry's techniques, the Company asserts that it could not supervise him too closely without jeopardizing him and the investigation. In any event, the Company believes Berry conducted his undercover operation properly.

Finally, the Company maintains that the grievants' admitted violations cannot be excused under the "entrapment" defense since that defense has not been proved and is not available for application here in any event. The facts with respect to each grievant do not establish entrapment, the Company argues, insofar as both elements of entrapment, "inducement" and "lack of predisposition" must be found for the defense to succeed.

With respect to inducement; the Company maintains that the burden of proof is on the Union to show, by a preponderance of the evidence, that agent Berry's investigative techniques were outrageously excessive. This was not shown, in the Company's opinion.

With respect to predisposition, it is the Company's contention that once it has shown predisposition, the burden shifts to the Union to rebut. The Company sees evidence of predisposition in the fact that the grievants admitted to using marijuana off-premises, in their ready compliance and active role in arranging the drug sales to Berry, in their obvious familiarity with quality and price of marijuana, and in the fact that they knew who else in the mill was using it. The Union failed to rebut this evidence of predisposition, the Company argues, and thus the entrapment defense fails.

With respect to the Union's efforts to persuade the Arbitrator that the three female grievants were under special pressures because of their isolated status, the

Company maintains that no causal link was established between this fact and the transactions with agent Berry. On the contrary, argues the Company, these women showed themselves to be exceptionally strong-minded individuals by holding jobs in an all-male environment. In this respect, the Company maintains that the consistent testimony of its expert witness, Dr. Judson Smith, is more credible than that of the Union's witness, Dr. Bishop. Dr. Smith saw evidence of strength in the grievants' observable behavior, whereas Dr. Bishop saw weakness "supported only by theories and studies for whose application to this situation he can cite no support." (Co. Brief, p. 98)

"The law presupposes that we act with a free will," the Company asserts, "in fact, that presupposition is the basis for our whole system of laws. . . . The Arbitrator is therefore compelled to assume behavior is not induced, for purposes of enforcing the law, absent compelling evidence to the contrary." (Co. Brief, p. 100) It is the Company's contention that the Arbitrator should evaluate the evidence independently of the conflicting expert testimony since entrapment is a legal issue, not a psychological issue, and the decision should be based on objective evidence in the record, not on contradictory theories of human behavior and motivation.

Finally, the Company maintains that the entrapment defense should not be made available to these grievants, regardless of the emphasis placed upon it by the Union, because police conduct is not deterred by an Arbitrator's finding of entrapment, nor is an individual's freedom from incarceration protected. These are the functions of a court enforcing public law. An Arbitrator's function is to interpret and protect the Collective Bargaining Agreement. In this case, that means enforcing the clear intent of Mill Rule 7(a) which is to enhance safety in the workplace—a social policy mutually supported by both the Company and the Union. If the entrapment defense is

allowed to succeed in this case, the Company urges, "it would send the wrong signal." (Co. Brief, p. 106) Employees would be led to believe that they can bring or use drugs in the mill, and the worst that can happen is that they will put on a "last-chance' 'EAP program. This is precisely what both parties do *not* want employees led to believe. Therefore, if the Arbitrator takes it upon herself to reduce the penalty of discharge, she will be reversing not only the Company's intent, but that of the Union as well.

For all of the aforestated reasons, the Company asks that the grievances be denied.

The Union

It is the position of the Union that the discharges of the grievants were not for proper cause. The Union maintains that the discharges were unfair for three reasons: 1) the grievants were improperly induced to bring marijuana into the mill by agent Berry; 2) the Company failed to offer the grievants an opportunity to participate in the EAP program; and 3) the discharge was excessively harsh in light of the Company's past practice of progressive discipline for such serious violations of other Section 7 Mill Rules as theft and insubordination.

With respect to the first argument, the Union asserts that Timothy "Al" Berry was a *Company* employee while he conducted his investigation in the mill, yet he violated several Mill Rules himself without Company disciplinary action. Specifically, he smoked cigarettes in non-smoking areas, he smoked marijuana on mill premises (or, at a minimum, he feigned doing so, in which case he still "possessed" it), and he worked under the influence of some substance which caused him to collide with a guide post while driving a truck in the mill. Most importantly, he continually and repeatedly pressured co-workers to sell him marijuana and/or to smoke it with him. And it was this pressure, the Union maintains, which caused the

grievants ultimately to give in to his requests. Since Berry's behavior at work would be grounds for discharging any other employee, the Union argues, it cannot be used to justify the discharge of employees who were victimized by that behavior.

The Union maintains that it has proved the causal nexus between Berry's conduct and that of the female grievants in particular through the evidence of the grievants' isolation as the only women working in their positions and Dr. John Bishop's expert testimony on the expected effect Berry's pressure would have under these conditions. Three elements are important, the Union asserts: 1) Berry's conduct occurred not "on the street" where the grievants were free to avoid him, but in the workplace where they had to deal with him as a co-worker; 2) not only did they have to cope with Berry as a co-worker, they had to cope with the fact that he was a man in an overwhelmingly male environment and therefore in a position of considerable power. He could easily make life difficult for them and probably with impunity; 3) Berry exploited his position of power by using ingratiating and sophisticated misrepresentation techniques such as flattery, the purchase of small favors, personal confidences about his private life, requests for social meetings after work, and the like. Linda Willoughy was particularly vulnerable, the Union argues, because she was ill and still under EAP treatment while Berry was pressuring her. Kimberly Denis had previously turned in male co-workers for serious violations of Mill Rules and then found herself having to live with those men when only minor discipline was meted out. All had a "Hobson's choice;" they could put up with Berry's harassment and work harder to win approval, or they could report it—and probably have to work harder yet to win *back* approval.

It is the Union's contention that the testimony of *both* psychologists supports its case. Not only do the Milgram

experiments cited by Dr. Bishop explain why the grievants were unable to withstand the repeated requests for compliance with Berry, but the "diad/triad" theory expounded by Dr. Smith explains it as well because the female grievants *had* no other women working in their area with whom they could form such supportive relationships.

The Union asserts that, while it has met the standard of proving "entrapment" in this case, it should not be held to that legal standard. Instead, standards of demonstrating "provocation" should be applied, and the Arbitrator should find that the grievants were provoked by an agent of the Company in much the same way as grievants have been found provoked by abusive or derogatory slurs made by their supervisors in numerous arbitration cases on insubordination. The Union summarizes (Union Brief, p. 32-33):

> "The principles garnished from these cases are directly applicable to the present grievances. Given the position of the grievants and the particular circumstances surrounding their work environment, it is clear that S.D. Warren, through 'Al' Berry, induced them to violate the Collective Bargaining Agreement provisions. Whether it is toxic fumes or excessive noise causing someone to leave their job, or whether it is the foreman provoking employees into fights, or whether it is an employee or its agent using every imaginable tactic to induce grievants to violate the Collective Bargaining Agreement, the same results should follow. No termination is just when induced and/or provoked by the employer's actions."

With respect to the second argument, the failure to offer a "last-chance EAP opportunity" to grievants, the Union argues that the EAP program was found by Arbitrator Katz in the *Greenlaw* decision to be a *joint* program geared towards helping troubled employees solve their problem before they lose their jobs—and that it has

been offered on a last-chance basis in lieu of discharge in the past to many employees with extremely poor work records. Most such last-change agreements (UX 10-26) have benefited everyone, the Union asserts; the employee has improved and saved his job; the Union has retained a member, and the Company has retained the services of an experienced worker.

The *Greenlaw* decision also stated as follows (UX 1, p. 14, FN 4, cited in Union Brief, p. 41, emphasis added):

> "I am not suggesting that the Company is irrevocably bound for the indefinite future to offer EAP to all 'troubled' employees who are about to be discharged. The Company may initiate a policy whereby it strictly enforces its right to discipline and discharge employees for misconduct occurring before they enroll in the EAP. *However, before such a change is initiated, the Company must provide sufficient advance notice to the Union and employee.*"

It is the Union's contention that the Company never notified either the grievants or the Union about any impending change in policy regarding progressive discipline.

It is the Union's further contention that the grievants were fully eligible for the EAP program inasmuch as the Policy Statement explaining the purpose of the program in the brochure specifically states that the program is for employees who have problems affecting their "attendance, *safety*, or productivity." (UX 2, cited in Union Brief, p. 42, emphasis added) (inasmuch as the Company grounds its no-drugs policy in safety considerations, employees violating the policy have a problem affecting their safety by definition—and, hence, are prime candidates for EAP counseling before they lose their jobs.

The Union also argues that no one before these grievants has been discharged prior to being offered opportunity to participate in the EAP program. Moreover, the results of most last-chance EAP agreements have been

extremely favorable with the majority of employees conquering even alcohol abuse—something Dr. Bishop said is more difficult to accomplish than conquering marijuana abuse. The reason for the disparately harsh treatment of these grievants, the Union surmises, is simply that the Company is more familiar with (and tolerant of) alcohol than it is with marijuana. Nevertheless, the Union argues, "The personal bias that mill management have demonstrated in favor of alcohol should have no bearing on the application of the EAP policy. The failure to offer this program to the grievants constituted a violation of the Collective Bargaining Agreement." (Union Brief, pp. 44-45)

Finally, with respect to the third contention, that discharge is inconsistent with the past practice of imposing progressive discipline, the Union argues that employees have violated virtually every provision of Section 7 in the Mill Rules—all without termination. These have included incarceration, leaving the mill while on duty, smoking in restricted areas, dishonesty involving surreptitious removal of Company property, willful disobedience, insubordination, disorderly conduct involving fighting, obvious sleeping on duty, and refusing to comply with Company rules by sexually harassing female employees. (UX 27 and 4a-d) The longest suspension on record is six months imposed on two employees found to have stolen approximately $25,000 from the Company.

The Union rejects any contention that Mill Rule 7(a) is somehow different from the rest of the many provisions in Section 7. The language itself makes no such distinction, and even alcohol-related offenses, including possession and apparent use on mill property, have been disciplined progressively. "In short," the Union concludes, "all Section 7 violations received previous warnings before individuals were given any kind of lengthy suspension and all termination cases were offered participation in the EAP." (Union Brief, p. 48) Moreover, aside from

analyzing an employer's progressive discipline system, arbitrators have taken into consideration an employer's culpability in provoking the incident when overturning or reducing discharge penalties.

For all the aforestated reasons, the Union asks that the grievances be sustained. With respect to remedy, the Union asks that the three living grievants be reinstated with full back pay and benefits dating from their terminations on February 15, 1984 and that the estate of deceased grievant Buhelt be appropriately compensated.

OPINION:

The Agreement: Plain or Ambiguous?

The Company maintains that "Mill Rule 7(a) provides for immediate discharge." (Co. Brief, p. 3) It substantiates this position on four grounds: "the plain meaning of the contract, past practice, bargaining history and public policy." (Co. Brief, p. 5) Let us examine these in turn.

First, is the meaning of the contract plain? I cannot find that it is. Granted Section 7 of the Mill Rules is titled "Causes for Discharge," but there is no verb used. It does not say whether such causes "*will* be" or "*may* be" ground for termination. The title is then followed by two separate sentences (JX 1, emphasis added):

> "Violation of prescribed rules are cause for disciplinary action *of varying degrees of severity.*
>
> Violations of the following rules *are* considered causes for discharge."

These two sentences heighten, rather than clarify, the ambiguity of the title. *Will* violation of Section 7 rules invariably be penalized with discharge or not? It is not clear.

Nor do I find the Company's position supported by reading Mill Rule 7 in conjunction with Mill Rule 8 or

with Company Safety Policy. Mill Rule 8 simply adds that certain other violations are "Causes for Discharge After Appropriate Warning." Again, no verb is used in the title; we still do not know whether the parties agreed such violations "will be" or "may be" causes for discharge. We only know that those employees are guaranteed at least one warning before they are terminated. Finally, we find the verb "may be" used in Company Safety Policy handbook (CX 16, p. 4, emphasis added):

> ". . . violations of rules printed in red *may* mean immediate discharge. Violations of other rules *may* be cause for discharge after appropriate warning."

The ambiguity of the verb "may be" is further heightened when we find that the rules printed in red include *both* Mill Rule 7a(a) and 8(a) (CX 16, p. 16):

> "26. Intoxicants—Liquor or Drugs
>
> a. Bringing in or consuming liquor or drugs on Company property is absolutely forbidden.
>
> b. An employee will not report to work under the influence of liquor or drugs."

The Company argues that the combination in red of rules distinguished in the Agreement demonstrates that "the safety standards err on the side of the strictness and not leniency." (Co. Brief, p. 5) I would agree were it not for the fact that *the Company* used the phrase "*may* mean immediate discharge" in explaining the intent of red print in its safety booklet. Inasmuch as the safety booklet is a unilateral statement of Company policy, not a negotiated agreement with the Union, the Company had full opportunity to state that violations of rules "in red" *will* mean immediate discharge. Instead, it chose to retain discretion over such decisions by using the word "may." In so choosing, it allowed a third party neutral the same discretion when reviewing the propriety of those decisions.

Second, the Company argues that "past practices" supports its contention that the meaning of the Agreement is plain. Again, I cannot agree. The Company relies almost exclusively on various notices which have been posted in the mill or newsletter statements made by the Union. Setting these aside for the moment, I note that "practice" means something other than "notice." It means what has been *done* rather than what has been *said*. What has been done when employees have violated Mill Rule 7 in the past? The record shows that the vast majority of Rule 7 violations have been penalized with something less than immediate discharge. To be specific, other than the cases at hand, of the forty-one (41) identifiably Rule 7 violations in the record, only two (2) such violations have been penalized with immediate discharge, and both involved incarceration for serious crimes (manslaughter and incest, according to unrebutted Union testimony). (JX 10, UX 10-26, 27) The Arbitrator has charted the seventy-five (75) disciplinary actions and sixteen (16) last-chance EAP agreements submitted by the Union according to severity of penalty to see whether a pattern of progressively severe discipline for progressively serious employee misconduct exists. It does not. Even where prior warnings have been given, mere verbal warnings for such Rule 7 violations as sleeping (7(i)), smoking in restricted areas (7(b)), and leaving the mill without permission (7(k)) have been given. (UX 27) Similarly, at least eight (8) written warnings have been issued for Rule 7 violations such as sleeping, smoking, leaving without permission and insubordination (7(e)) and disorderly conduct (7(g)). No fewer than eighteen (18) supensions (sometimes accompanied by a demotion or probationary period) have been meted out for Rule 7 violations. The suspensions have ranged from one day for insubordination, to sixty (60) days after violating an earlier last-chance EAP agreement by drinking on the job—to the maximum of six months for embezzlement of as much as

$25,000.[4] Finally, last-chance EAP agreements have been given to at least six (6) employees found to be violating Rule 7. One was given after incarceration (7(m)), three after violation of Rule 7(d) (refusal to comply with Company rules) and/or Rule 7(e) (insubordination) and 7(f) (neglect of duty, and two after apparently violating the rule at issue here—Rule 7(a). These latter last-chance agreements involved one employee with an alcohol problem. It was the uncontradicted testimony of union president William Carver that this man was given his first last-chance EAP agreement in 1981 (UX 25), but he violated it by drinking at work to the point where he would pass out before the end of the shift. On May 27, 1982, he was placed on a 60-day suspension, with reinstatement conditioned on his maintaining "total sobriety" during the suspension, strict adherence to EAP counseling and treatment including antabuse if prescribed, attendance at weekly AA meetings, and certification for fitness to return to work by Company doctor. (UX 23)

If any pattern emerges from an examination of past practice where Mill Rule 7 violations are concerned, it is the Company's consistent effort to help employees redeem themselves before they suffer the loss of their jobs. Some might disparage this as leniency, but there are strong arguments that salvaging experienced workers is sound, cost efficient, business practices. Whatever the case, it has been the Company's chosen approach even where violation of Mill Rule 7(a) was involved.

This is not to say that the matter of notice is irrelevant, however. Notices may not constitute a past practice, but they do exist in the record, and the ques-

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[4] Unlike the other penalties, written documentation of the six-month suspension is not in the record. Union President William Carver's testimony that two employees were given this penalty for embezzlement was unrebutted, however, and "dishonesty" is a violation of Mill Rule 7(h).

tion arises as to whether they constituted the notice of a change in the Company's intent which Arbitrator Katz said would be necessary if the Company wished to alter its practice of warning employees before discharging them for most Rule 7 violations. Two notices were posted after the *Greenlaw* decision was issued in April of 1983: one was posted on or about October 4, 1983 (CX 7b), and the second was posted on or about December 10, 1983. (CX 7c) In adidtion, the Union put out a newsletter in October, 1983 which included warnings about the no-drugs policy. (CX 17) Let us examine them in chronological order:

The October 4, 1983 notice stated as follows (CX 7b):

> "ALL OR US MUST RECOGNIZE THAT THE USE, SALE, AND POSSESSION OF ILLICIT DRUGS IS A PROBLEM IN ANY ENVIRONMENT, ESPECALLY THE WORKPLACE. FAILURE TO RECOGNIZE, AND COMBAT THIS PROBLEM EFFECTIVELY, ONLY LEAVES THE DOOR OPEN TO THAT SMALL MINORITY WHO VIOLATE THE LAW, AND MILL RULES, WHICH ARE DESIGNED TO PROTECT ALL OF US FROM EXPOSURE TO THE OBVIOUS DANGERS OF SUCH ACTIVITY.
>
> THIS NOTICE IS ISSUED TO REMIND ALL EMPLOYEES THAT WE ARE COMMITTED TO THE CONCEPT, THAT ILLICIT DRUGS OR INTOXICANTS WILL NOT BE TOLERATED IN THE WORKPLACE, WHETHER BY USE, POSSESSON, SALE OR REPORTING UNDER THE INFLUENCE. SUCH INFRACTIONS MAY LEAD TO IMMEDIATE DISCHARGE.
>
> PLEASE TAKE THE TIME TO READ AND UNDERSTAND THIS MESSAGE, AND MORE IMPORTANTLY—HELP US TO KEEP *OUR* WORKPLACE FREE OF DRUGS AND INTOXICANTS."

This notice states that "such infractions *may* lead to immediate discharge" whereas in an earlier notice, posted October 30, 1981, the statement was made "that any person violating these rules *will* be discharged." (CX 7a) Additional ambiguity arises where the Company included "reporting to work under the influence" (a Rule 8 violation), in both notices. (CX 7a & b)

The timing of the October 4, 1983 notice is significant in that it was posted after the *Greenlaw* decision and about the time that agent Barry began working in the mill. It was industrial relations manager Peter Malia's testimony that very few members of management were informed of the investigation underway, and the Union was told nothing on grounds that knowing would put Union leadership in a difficult position. This sensitivity was commendable, in my opinion, and its continuance will benefit the labor relationship in the long run—but in this instance it clouded the message the Company was trying to convey. Now that we all know about the investigation, the Company attempts to read meaning back into the notice which is not apparent on its face. The Union could not be expected to "get the hint" when it knew nothing of the undercover operation, especially when the language used in the notice was routine in tone and more equivocal than one previous. The same applies to the Union newsletter issued in October, 1983. The October, 1983 Union newsletter covered a wide range of Union business, including the following reminder (CX 17):

> "Once again it is necessary to remind everyone that the use of illegal drugs and/or alcohol is a very serious offense. The company has notified the union that anyone caught possessing and/or using drugs or alcohol on company property will be immediately terminated. And their position is very strong on this. The union can only hope that everyone will follow these rules and not jeopardize their job, their

> families, or the safety of their fellow workers. We already had two employees discharged this past summer."

At first glance, this statement makes it appear that the Union had been put on notice of an absolute "*will*-be-terminated" position on the part of the Company. On second glance, however, the Union acknowledges its long-standing support of the no-drugs policy *per se*, and the newsletter can be viewed as a routine reminder similar to those in the orientation speeches made by the union president to new employees. The Union denies that it was given any notice of a Company intention to interpret Mill Rule 7(a) henceforth as *requiring* immediate discharge or of an intention to administer the progressive discipline differently where 7(a) violations are involved. There is no Company testimony that a special meeting with the Union was held, and Bill Carver was uncontradicted that normally the Company informs the Union of charges at Third Step meetings when international representative Gary Cook is present, or at a meeting with the Union Executive Board.

The December 10, 1983 notice is similarly open to interpretation. It stated as follows (CX 7c):

> "Recently an employee entered a closed, locked shop area, used a saw which is restricted for 'Authorized Personnel Only', and amputed parts of three fingers. While the bodily injury was certainly sad and needless, the pain and suffering accompanying the termination of this employee was also very regrettable. It is an extremely difficult time for both the employee and the Company.
>
> We must remind ourselves that Mill Rules, including unauthorized use of equipment, possession/use/sale of alcohol or other drugs, and theft of Company property, cannot be ignored. They apply to all employees, hourly or salaried, and we must expect

full understanding, acceptance, and compliance by everyone.

Failure to comply with these specific rules will result in termination."

Admittedly, this notice concluded with the statement that "Failure to comply with the specific rules *will* result in termination," but too much reliance cannot be placed on the use of one word in one Company notice where negotiated language in the Agreement is ambiguous and prior Company notices have not been consistent in the use of that word. Moreover, the main thrust of the notice dealt with an employee who amputated three fingers using restricted equipment without authorization, and possession/use/sale of *alcohol*, and theft were also included among the "specific rules" not to be ignored.

In short, there is too much mixing of rules and too much room for misunderstanding in the post-*Greenlaw* notices to conclude that the Union and employees knew or should have known that henceforth possession, use or sale of drugs in the mill would invariably result in immediate termination. All they knew was what had been understood for some time: the Company *could* consider it grounds for severe penalty including discharge—as stated in Mill Rule 7 of the Agreement.[5]

Third, in addition to plain language and past practice, the Company argues that bargaining history supports its position that the Agreement is clear and cannot be altered by the Arbitrator. Here the Company points to the Union's proposal during the 1983 contract negotia-

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[5] It should be understood that finding no *Greenlaw* notice had been given prior to the discharges is not a finding that the Company cannot give this notice in the future. Quite the contrary, I concur in Arbitrator Katz's conclusion that the Company retains the right to inform the Union of its fixed intention to discharge violators of Mill Rule 7(a) henceforth. As Arbitrator Katz put it, however, the notice must be "sufficient" and that test the Company has yet to meet.

tions to move subparagraphs other than 7(a) in Section 7 of the Mill Rules to Section 8 where violation would subject the employee to termination only after appropriate warning. (CX 15) Since 7(a) remained in Section 7 even in the Union's proposal, the Company contends it is apparent that, "by implication, the intent of both parties was to leave 7(a) offenses punishable by immediate discharge." (Co. Brief, p. 10) The difficulty with this line of argument is precisely as the Company states; it is reasoning "by implication," and implication is a weak reed to rely upon in contract interpretation, especially where a negative is involved. In this instance, the Union asserts that it proposed to move subparagraphs (b), (d), (e), (f), (g), (i) and (m) from Section 7 to Section 8 to make the Agreement conform with Company practice. This is supported insofar as the record shows numerous examples where violations of those subparagraphs were punished with warnings or suspensions rather than termination. (UX 27) But the reasons for wanting to move other subparagraphs tell us nothing about what was intended by *not* moving subparagraph 7(a). Furthermore, since no one had been accused of possession/use/sale of drugs in the mill before, no penalty had ever been imposed before—leaving the whole matter a big question mark. The language of Mill Rule 7 allowed the Company to *consider* violation of 7(a) cause for immediate discharge—but what would it do if the situation arose? Nobody knew, or could know, until it happened, and moving other subparagraphs (had the Company agreed) would not have provided the answer.

Fourth, the Company maintains (Co. Brief, p. 11):

> "Should the Arbitrator fail to apply the plain meaning of the contract and the parties' clear, consistent and longstanding past practice and bargaining history, the clearly stated policies which have been consistently maintained and expressed by the Company in support of this rule would be severely under-

mined to the detriment of the Company and *all* employees."

The "policy" to which the Company refers appears to be the safety policy, i.e. the policy that employees are expected to follow safe work practices and not act to endanger themselves or their fellow workers. There is no dispute that this is agreed policy; both parties have an obvious interest in protecting the safety of the workplace. There is considerable dispute, however, over the *implementation* of that policy, especially where penalties for violation of it have been involved. The Company asserts that the policy has been "consistently" maintained; the Union emphatically disagrees, pointing to the wide range of progressive discipline which has been imposed for Section 7 violation. I find that the record supports the Union on this point. Violations of 7(k) (leaving the mill without permission, certainly an "unsafe" move since it jeopardizes other employees who assume the employee is present) have been penalized with verbal warning, written warnings, and two-day suspensions. The same applies to disorderly conduct. Sleeping on the job and smoking in unauthorized areas (two other obviously unsafe things to do) have been penalized only with written warnings—although they remain as violations of Section 7, punishable by immediate discharge. (UX 27) I see only one consistency in the Company's implementation of its safety policy—that of *amply* warning employees, even to the point of more than one last-chance EAP warning, before terminating them for violating Mill Rules.

The Company also argues that public policy as well as private, contractual policy, should be upheld by the Arbitrator, and it cites certain court decisions reversing arbitral reinstatement awards on grounds that reinstating a driver who admitted to driving while intoxicated, for example, would violate public policy against drunk driving. I make several responses: First, reversal is a pos-

sibility every adjudicator must live with, and fear of it should never influence the decision. Second, it is an arbitrator's responsibility to interpret and enforce the parties' Collective Bargaining Agreement, not to interpret and enforce public policies enshrined in external law. Third, the four grievances here involve different individuals and different circumstances. They cannot be lumped together or treated as equivalent to violating state laws on drugs. Some of the grievants may be prosecuted, in which eventuality I leave to the court questions involving state drug laws and public policy. It should be noted, however, that the question before me involves violation only of Mill Rule *7(a)*. Should any grievant be sentenced and incarcerated—and subsequently discharged under Mill Rule 7(m)—the opinion and award in the present arbitration case will have no bearing on those discharge actions.

Quantum of Proof: Preponderance, Clear & Convincing, or Beyond a Reasonable Doubt?

The Company argues first that this question is moot because the grievants effectively admitted their guilt. Unfortunately, it is not that simple. Grievant Buhelt made no such admission from the grave. Grievant Denis made no such admission. She maintained that she never "possessed" or "sold" marijuana; she merely told agent Berry where he could find some. Grievant Willoughby admitted only to possession not to "sale" with which she was also initially charged. Moreover, all three grievants differed with Berry's account in a myriad of minor ways, and this requires a myriad of credibility resolutions as to which account the Arbitrator believes.

So the question must be grappled with: what *is* the proper standard of proof here? As the Company notes in its Addendum, this is a question which has been debated by arbitrators for many years. The Company would have me side with those who have concluded flatly

that the "beyond a reasonable doubt" standard is a concept from criminal law which has no place in labor arbitration. While I appreciate the difference between the powers of the state and those of a private employer, I find this line of reasoning disturbingly *a priori* and overly rigid. It is also misleading. The real question is not whether a formulaic phrase used in criminal law should be "borrowed" by arbitrators. It is whether arbitrators should require different standards of proof in different kinds of cases and, if so, what the standard should be here. The answer to the first is easy; common sense says that the more consequential the case, the more proof should be required. If a person is going to be executed upon conviction, no fairminded jury member will expect to sleep at night unless he is persuaded "beyond all reasonable doubt" that the accused is guilty. It has long been said that discharge is "the capital punishment of the workplace." Consequently, arbitrators have always been exceptionally concerned that they get to the truth of the matter and not "condemn" an innocent employee. This concern is all the greater where the alleged misconduct is not only violative of the Agreement, but is also potentially criminal or carries with it significant social stigma as is the case with drug dealing. (See "Standards of Proof and Investigative Evidence" in *Alcohol and Drugs Issues in the Workplace*, Denenberg, BNA, 1983. It is one thing to uphold a discharge for excessive abstenteeism or poor workmanship. Future employers may assume the individual has matured, or they may be willing for other reasons to hire him. Upholding a discharge for *drug* activity is another matter altogether. Most employers are too busy to read a lengthy arbitration award or to make allowances for "minor" drug violations. They simply hear the word "drug" and pass over the applicant in favor of one with an apparently clean record. This "kiss-of-death" effect of a drug-related discharge is what leads arbitrators to want the strongest proof possible before they will deny the grievance.

The other side of the coin also must be taken into consideration, however—that of protecting safety (i.e. fellow employees) and the safety of the workplace. This is the eternal balancing of individual versus societal rights which is the essence of all adjudication. Here is where arbitrators should "take their cue" first from the parties themselves before turning to external legal principles or to their personal philosophies. Even if the contract does not explicity address the standard of proof question, an insightful examination of the entire Agreement, past practice, negotiation history and nature of the industry will reveal the parties' preference in weighing individual against societal interests. Based on the voluminous record in this case, I conclude that *these* parties have long placed the greater emphasis on individual rights. It is evident in certain provisions of the Agreement, for example, in the last sentence of the Grievance and Arbitration clause prohibiting an arbitrator from taking into consideration in discipline cases prior warnings more than one year old (Article 12, Section 6). What this means is that if an employee has not jeopardized his fellow workers by "sleeping on the job" or similar Mill Rule behavior, for more than a year, he will be given "the benefit of the doubt" in spite of the fact that he may do it again. This contractual principle of giving the benefit of the doubt to the individual has been put into practice *repeatedly* over the years, the record shows, as numerous employees have endangered themselves or co-workers with various Mill Rule 7 violations and have not been discharged. (Since the true purpose of progressive discipline is rehabilitative rather than punitive, this practice has been very successful as most employees appear to have heeded their warnings.)

There is another section of the Agreement which reveals the parties' concern for the individual employee. It is the No Strike-No Lockout clause (Article 13) which provides, in part, that the question "of whether an employee in fact was a participant [in a strike or work

stoppage] may be referred to the grievance and arbitration procedure." (JX 1) Granted, this language was intended for application in strike situations, not drug investigations, but it reveals the same concern—i.e. that an individual not be unfairly penalized for group behavior in which he did not actively participate and over which he may have had no control.

In sum, I conclude that these parties place their own premium on the individual in individual-versus-society situations of this sort, and I am bound to do the same. For this reason, the "beyond a reasonable doubt" standard will be applied.

The Defense: "Entrapment" or "Provocation?"

The Company argues that the defense of "entrapment" is not available in this case. Should the Arbitrator find that it is, however, the Company maintains that the Union must show both that the grievants were "induced" and that they were not "predisposed" to sell drugs in the mill. The Union responds that it has proved entrapment, but it should not be held to such a high standard of proof; instead it should be held only to proving that the grievants were "provoked."

With respect to the availability of the defense on the merits, I arrive at two conclusions: 1) The entrapment defense is available here because it is grounded in the same concern for fairness as is the "proper cause for discharge" clause in the Agreement, 2) It matters little whether the defense is characterized as "entrapment" or "provocation" because both theories require the Arbitrator to examine the evidence on "predisposition." This was done implicitly or explicitly in all of the provocation awards cited by the Union inasmuch as each arbitrator determined whether the grievant was willingly involved in the fight (or whatever) in spite of his having been provoked to some degree. For example, in *General Tire and Rubber Co.* (69 L.A. 1084, 1977), Arbitrator Nicolas

decided that the grievant was not predisposed to engage in fisticuffs with his supervisor because the evidence demonstrated that he was not the aggressor, that he acted largely in self-defense, and that he showed self-restraint under all the circumstances.

If it matters little whether "entrapment" or "provocation" theory is used in determining the merits, it does matter with respect to the remedy. As a general rule, when individuals are found to have been "entrapped," they are acquitted as "not guilty." In provocation cases, on the other hand, arbitrators have nevertheless determined that grievants were culpable to some extent for their misconduct, and some penalty short of discharge has been assessed. For these reasons, I will apply the term "provoked" rather than "entrapped."

Now, deciding that "predisposition" must be determined does not answer another question: Who has the burden of proving it? Must the Union prove that the grievants were not predisposed, or must the Company prove that they were? I conclude that, if the Union demonstrates that the grievants were "induced" or "provoked," the burden then shifts to the Company to demonstrate that the grievants were "predisposed" or "willing"—and it must do so with *evidence*, not conjecture based on psychological theories of human behavior.

Since so much time and effort was spent exploring psychological experimentation and theory at the hearing, however, I feel that I should respond. First, I agree with the Company that our legal system is based on a presumption of free will unless strong evidence to the contrary is presented. But I approach the evidence with an open mind—something I did not sense in Dr. Judson Smith's testimony, especially when he opined that people often have "a need" to be abused. I also remain wholly unimpressed with his testimony that male employees identify with teams and work for the corporate goal while female employees tend to identify with "diads" or "triads" and

work principally for the money. I am skeptical of all research purporting to show gender differences in human behavior. I suspect the tendencies Dr. Smith discussed vary more by individual personality than by gender, and most people of both sexes need both large and small groups with which to identify and both financial and common goals as incentives.

Now, having said that about Dr. Smith's testimony, let me say this about the point of view presented by the Union psychologist, Dr. Bishop. Both Dr. Bishop and Union counsel in his post-hearing brief argue eloquently for an understanding of the extraordinary pressures which a "pioneer" suffers while he or she is the only person of a kind attempting to lead the way for others. I accept that those pressures are enormous. Company psychologist Dr. Smith himself described his once being the only white male in an otherwise predominantly black workplace as "an unforgettable experience" which left him with abiding sympathy for all minorities. There is a point, however, where sympathetic understanding can shade into patronization—a fine line adjudicators should not cross. It must be remembered that the three women grievants held their particular jobs voluntarily. They did not claim that the Company discriminated against them or that they were entitled to some special treatment. They described their relationship with male co-workers as comfortable for the most part and accepted most of the kidding they received as normal workplace banter. I also note that while the grievants were young (in their 20's), they were all adults when agent Berry approached them (not children under twelve, as Lt. Snow said undercover agents are expected to avoid), and all three had control of their own minds (none was "obviously insane," none was apparently affected by substance abuse, and even grievant Willoughby believed she was improved enough emotionally to make her own decisions without EAP help). All of these considerations must be weighed against

the admittedly severe pressures each was under as the only woman in her respective work area.

Questions of Remedy

Having dispatched with questions of interpretation and proof, we come now to the question of remedy. First, do I have the authority to reduce the penalty if some culpability on the grievants' part is found? The Company argues that I do not because the contract clearly calls for discharge. That contention was laid to rest at the beginning of the opinion; the Agreement does not "clearly" require immediate discharge, and past practice only heightens the ambiguity about what will happen to the employee who violates Mill Rule 7. Nor is there any express restriction in the Agreement limiting the Arbitrator's remedy authority. Under these conditions, it is well established that where an arbitrator is adjudicating a "proper cause" case, and he or she finds that the discharge penalty was improper because it was arbitrary, capricious, in bad faith, discriminatory, excessively or disparately harsh, or just plain unfair—he or she has the authority to fashion a lesser penalty or direct make-whole remedy as the facts of the case require.

Now the question arises as to how a lesser penalty should be determined where discharge is found improper but no similar cases exist with which to compare. I speak here of the fact that there are the first *drug*-related discharges to occur. Does this mean I am free to impose my own "brand of justice" based on personal disapproval of drugs? Obviously not. As in all things previous, I must turn to the parties for guidance. It is not the Arbitrator's role to grant clemency; neither is it my role to impose a much harsher penalty than has been imposed for similar behavior in the past.

The most similar behavior is alcohol possession, use or sale. The Company would have me distinguish between alcohol and drugs here. I recognize that external, state

law makes such a distinction—*but the Agreement does not.* The Agreement lumps "intoxicants, marijuana, narcotics or other drugs" into one rule 7(a)). It then lumps that subsection into a long list of other forms of serious misconduct—some endangering to others and some potentially criminal in nature—for which immediate discharge may result. Nor is there any evidence that the Company has consistently distinguished between criminal and non-criminal misconduct in the progressive discipline it has meted out. Neither theft nor incarceration have always met with discharge.

It is not implied that discipline must be meted out according to a mathematically precise formula; every case *is* different, after all. But the Arbitrator should determine the parameters of "the parties' ball park" and stay roughly within them. If previous suspensions have been in days, for example an arbitrator should not impose a suspension in months, and so forth. Here I note that the longest suspension on record appears to be the six months imposed on two employees for embezzlement. The one other employee who violated Mill Rule 7(a) (for using alcohol in the mill) was given a 60-day suspension. (UX 23) In the past ten years, the record shows there have been at least nine other suspensions for Mill Rule 7 violations, ranging from one day to seven weeks. (UX 27)

Finally, the role of the EAP program in discipline must be addressed. I agree with the Company that the grievants in this case were not entitled to a "last-chance" EAP agreement in lieu of disciplinary action. The EAP exists to help employees whose personal problems, alcoholism or drug *abuse* are affecting their work performance; it does not exist to provide alternative punishment for offenses such as drug *dealing* where there is no evidence that the offender's behavior was caused by substance abuse.

In sum, drug activity in the workplace must be viewed as very serious misconduct, but I can find no contractual

justification for penalizing it with workplace execution while employees who have engaged in other forms of serious misconduct are merely fined with suspensions or are slapped on the wrist with warnings. Under the proper cause provision, the Company has the right to discipline employees who violate Mill Rules, including the right to discharge where necessary, but the discipline must be reasonably even-handed to be fair or "proper." This is precisely the issue before the Arbitrator: Did the Company have proper cause to discharge these grievants and, if not what shall be the remedy? I turn now to resolving these questions in each grievant's case.

Kimberly Denis

Grievant Denis admits that she took money from agent Berry for the purpose of getting him some marijuana from Miller Hunt, and that she told Berry where the marijuana was when he asked about it. Beyond this, however, the testimony of Denis and Berry varies at numerous crucial points, and the Arbitrator has the unenviable task of determining whose testimony is the more credible. For clarity and conciseness, I lay out that determination and the reasoning behind it in the following chart form: (*Italics* indicates the testimony credit. In some instances, I credit both.)

Kimberly Denis	*Timothy Berry*	*Reason*
one gram for $10	(*two grams for $20*)	State Analysis Report shows two grams tested.
did not say "supplier"	that her supplier only had a dime bag left	"Supplier" is a term of art more likely used by policeman Berry than by grievant. Also report did not use quotes.
he offered $20, then replaced with $10	(*she suggested $20*) (*she offered to keep the $20*	By her own testimony, the grievant was trying to keep

I kept trying to give the $20 back He named Miller Hunt	(*I didn't know him yet*) (*Report—guy in coater cutters*)	on Berry's "good side." Berry had not been in the mill very long and probably had not met Hunt.
I just pointed	she said "I put the pot in the core of that roll of paper."	The plant is noisy; he could have misheard or assumed.
He asked me out; I said no	*She asked me out, I said no*	They were on friendly terms; both could have suggested a drink after work without meaning much by it.
He asked me 4-5 times to smoke mj with him	*Never*	Both smoked cigarettes; there is ample room for misunderstanding here too.
I never smoked in the mill; it's a good way to lose your fingers	Her eyes were red; her skin pale, she said she had been doing it	Other witnesses testified to fumes in her area which made their eyes red; she is naturally fairskinned; Berry is not qualified to diagnose; she could have been kidding.

Thus, I find that grievant Denis agreed to try to get Mr. Berry $20 worth of marijuana, and, when he said he couldn't wait until Saturday, she went to Miller Hunt on her own to ask if he (Hunt) would sell some to Berry. Later she pointed Berry in the direction of the marijuana.

According to police witnesses, this was "trafficking" in the eyes of the law. But that is not the question before the Arbitrator. Here the question is, was what Ms. Denis did within the meaning of the Agreement's prohibition in Mill Rule 7(a) against "possession/use or sale" of drugs

in the mill? I conclude that it was. It is abundantly evident that neither the Company nor the Union condones *anything* having to do with drugs in the mill. I am persuaded that grievant Denis knew this. She admitted to being aware of Mill Rule 7(a). Her contention that she didn't think she was doing anything wrong at the time because going to Hunt on Berry's behalf wasn't really "possessing" or "selling" drugs is self-serving rationalization. The same applies to her comment that what she did was "nothing compared to what those other guys were doing" (referring to employees, not grievants in this case, who were also discharged for drug dealing in the mill). Two wrongs do not make a right, and arguing that others are worse does nothing to justify one's own misconduct. I note, moreover, that the Agreement makes no distinction between "marijuana, narcotics or other drugs." All are equally prohibited in the mill in Mill Rule 7(a). Any feeling that "it was only marijuana" may be supportable under state law which classifies marijuana differently from other drugs, but it is not supportable under the Agreement which treats them the same. In sum, I am persuaded beyond a reasonable doubt that grievant Denis violated Mill Rule 7(a) by her behavior acting as a go-between for Berry on November 3, 1983.

Now we turn to the question of whether she was improperly "induced." I conclude that she was not. Agent Berry admitted to asking her for marijuana "often." Pressed for a specific estimate, he suggested two or three times; Ms. Denis estimated that he asked her three to five times before she took $20.00 from him. Let us settle on the point of agreement: three times. I cannot find this excessive under all the circumstances. Granted, Ms. Denis was in a vulnerable position. She was a woman half Berry's age working alone in an overwhelmingly male environment. She was in no position to risk alienating him, and she could not avoid him. But she had not exhausted her alternatives when she went to Hunt on Berry's behalf. She could have said she didn't

know who else he might get it from in the mill that day, for example. Berry would hardly be offended if she simply did not know something—unless, of course, she had actively led him to believe she did. In short, I cannot find that she was "provoked" beyond the limit where a normal person could be expected to behave differently.

Finding no improper inducement, the question of predisposition need not be addressed. But the question remains whether or not discharge was the appropriate penalty in this case. It was concluded above that under Mill Rule 7 discharge is not mandatory; it is discretionary. In retaining that discretion in conjunction with the "proper cause" limitation, the Company also retained an obligation to be fair, to be even-handed in disciplining employees for violations of Mill Rules. I cannot conclude that the fairness obligation has been met where the Company has "walked the extra mile" with so many violators of Mill Rule 7 in the past in spite of the seriousness of their violations. Insofar as this was the Company's first experience with an undercover drug investigation, its "off-with-their-heads" reaction to Berry's reports can be attributed to understandable nervousness rather than punitiveness—but it cannot be sustained as a matter of equity. The proper penalty is suspension.

The question now remaining is how long that suspension should be, i.e. how much should be subtracted from back pay. This should be determined not on the arbitrary basis of how long it took to get the discharge to reinstatement (more than seventeen months in this case), but on the basis of equity as understood between the parties. Here I conclude that the parties have always expected that possession, use or sale or drugs in the mill would be penalized severely, if not necessarily with discharge. Thus a suspension of many months is in order. Taking into account all the circumstances in this complex case, I conclude that the proper penalty is a seven-month suspension. Admittedly, this is longer than the

six-months suspension imposed on employees said to have embezzled up to $25,000, but drug-dealing constitutes a danger to all employees' safety whereas embezzlement does not.

Debra Graham

Grievant Graham admitted that she sold several grams of marijuana to agent Berry in the mill on January 12, 1984. I am thus persuaded beyond reasonable doubt that she did violate Mill Rule 7(a).

I turn now to the question of provocation: First, was she "induced" I find that she was. Agent Berry estimated that he asked her about drugs "perhaps six or seven times." Accepting this as more likely than Graham's varying estimates of up to thirty times, I nevertheless find it excessive. It must be remembered that Berry was a co-worker; he was not someone Graham could avoid. She had to put up with his behavior or report him to management. It is easy to say in retrospect that she should have reported him, but hindsight is always twenty-twenty, and all he was doing was *asking* her for something. If she considered reporting him, she probably was justified in concluding it would accomplish little other than making an enemy of someone she would continue to have to work with because all the Company would be likely to do would be to warn Berry to stop. In short, I find that Ms. Graham was caught in a damned-if-you-do-damned-if-you-don't situation in light of which Berry's repeated requests must be viewed as considerable pressure.

Second, was she "predisposed?" The Company maintains that she was, and it cites Berry's report that *she* approached *him* as the strongest evidence. Inasmuch as Ms. Graham denies approaching Berry, a credibility resolution must be made. I credit Berry. He wrote his report shortly after the transaction occurred while his memory was fresh. There is no reason why he should

state that Ms. Graham approached him if that were not the case. He did not report that the other grievants in this matter approached him. Graham acknowledged having Ronald Harmon with her at the time, but no reason was offered for Harmon's failure to corroborate her testimony. Ms. Graham has self-interest involved in claiming that Berry approached her. Her testimony also betrayed a ready familiarity with the "going price" of marijuana by the ounce and a flat unwillingness to sell it for less than she paid for it—in spite of her professed sense of obligation to Berry for his helpfulness. In sum, I find the evidence of Ms. Graham's predisposition to sell marijuana in the mill convincing. She was not provoked into doing something she would not have done otherwise.

The question now remains whether discharge was the proper penalty. It has been established that Ms. Graham did violate Mill Rule 7(a) and that she did so knowingly that it was cause for discharge. It has also been determined that she was not entitled to a last-chance EAP agreement. But, as a matter of fairness and equity, should she have been warned or suspended rather than discharged? As stated earlier, Mill Rule 7(a) is simply one of a long list of misconduct for which an employee may be discharged. There is no indication in the Agreement that 7(a) is regarded as more serious than, for example 7(h) (dishonesty, which presumably includes theft) or 7(k) (leaving the mill without permission). Violation of any one of the Mill Rule 7 provisions can be a serious matter; many put fellow employees at risk as well as the violator himself. *Yet the vast majority of employees who have violated Mill Rule 7 in the past have suffered suspension at most.* In light of this fact, I conclude that the discharge was unequitably harsh. The proper penalty is suspension.

How long a suspension? I conclude nine months is the appropriate penalty "to fit the crime." I take into account the fact that Ms. Graham had only a few months' experience in the mill when she sold marijuana

there—not enough time to build a good work record in her favor. Also, there is evidence in the record that she approached Berry with an offer to sell, and her demeanor as a witness betrayed a somewhat cavalier attitude towards marijuana in the mill. By assigning her the heaviest suspension in this case, the Arbitrator hopes to impress upon her the gravity of her misconduct.

Linda Willoughby

While grievant Willoughby admitted to giving Berry a small amount of marijuana at the mill on January 30, 1984, her testimony on the specifics of the circumstances varied enough from Berry's account to require close examination and credibility determinations by the Arbitrator. The following chart indicates in italics whose account is credited and why.

Linda Willoughby	*Timothy Berry*	*Reason*
he approached me 5 times	I approached her 3 times	4 times is found. She had motive to exaggerate; he could easily forget one unsuccessful approach.
5th time I took all of it from an envelope in my pocketbook and gave it to him.	*3rd time she took a bag from pants pocket, gave me "a very small amount"*	Berry's account is very specific; Willoughby more general. Berry has a presumption in his favor; Willoughby had incentive to minimize her involvement.
there was no remaining marijuana to sell or to put back in pocket	*She refused to sell any of the rest; she put it back in her pocket*	Same as above.
He had asked me to get him some 'weed" many times, as least once a week	I asked her perhaps two or three times	Berry admitted to being persistent where he got indication an employee might be willing. In addition to the three grievants, one co-worker attested to Berry's *frequent* talk of marijana.

Combining the above credibility determinations with uncontradicted testimony, it is found that Linda Willoughby was asked to provide marijuana eight to twelve times in the eight to twelve week period she knew agent Berry. On January 30, 1984, Berry approached her in her work area (not his) four times, but she kept putting him off. The final interval of time which elapsed between his next-to-last and the final (successful) approach was twenty minutes (1900 hours-1920 hours, according to Berry's report CX 14). She pulled a bag with perhaps a quarter-ounce of marijuana in it from her pocket, gave three (3) grams of it to Berry, and refused money in return. Granted, no "sale" occurred and granted, only a very small amount of marijuana changed hands—the Arbitrator is nevertheless persuaded beyond reasonable doubt that grievant Willoughby *possessed* marijuana on mill property and in doing so violated Mill Rule 7(a).[6]

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[6] With respect to the second piece of the grievant's behavior—her giving the marijuana to someone she believed to be a fellow employee—I conclude that the Company effectively dropped this "charge" against Willoughby when it answered the Union at the third step as follows (JX 2d), emphasis added:

> "The union stated position has been that Linda simply gave the agent a 'joint', that she took no money, therefore, was not guilty of sale of marijuana, thus should not be discharged. The settlement desired by the union to full reinstatement with back pay.
>
> *The facts presented in this case are, that Linda Willoughby did possess marijuana on mill property, on 1/30/84. Possession of marijuana on mill property is clearly stated as cause for discharge in Appendix A, Section 7(a) of the Labor Agreement.* Grievance denied.

Since giving the marijuana to Berry no longer serves as a basis for the termination, the Arbitrator should not address it. (The same applies to the Company's attempt to show that Ms. Willoughby was violating her EAP agreement at the time of her dealing with Berry by failing to appear at her counseling sessions. Even if this were proved, it was not given as a reason for the discharge in the notice of termination, and the Company cannot bring it forward at this point. (JX 3d))

Now, was the "induced" or "provoked" into doing so? It must be stressed that the question here is whether she was provoked into bringing the marijuana into the mill—not whether she was provoked into giving it to agent Berry. Ms. Willoughby attested that she brought the marijuana to work that day intending to give it to Berry in hopes that he would then leave her alone, and that she had never before brought marijuana into the mill. I find this explanation confused and contradictory. If she did not want to give it to him, as she claims is the reason for her repeatedly telling him she was "busy," why would she have brought it into the mill especially for him in the first place? In addition, if he had never before brought marijuana to work, why would Kimberly Denis tell Berry that she (Willoughby) probably had some? I credit Ms. Willoughby's testimony that she did not *want* to give any to Berry and that she did not suggest he see her after work because she didn't want to see him socially—but I cannot credit her claim that she brought the marijuana with her that day only for the purpose of getting Berry to leave her alone. What I find far more likely in light of all the evidence is that she had the marijuana for her own use probably after work, and that she had some frequently enough for at least one other employee (Denis) to know about it. It was not Berry's frequent asking which provoked her to do this; it was her own custom, something she was "predisposed" to do.

Having concluded that Ms. Willoughby freely possessed marijuana in the mill knowing that it was against Mill Rules, the question now is what is the proper penalty? In considering this question, there is one thing I do *not* take into account: the relatively small amount of marijuana involved in her case. *Any* amount is prohibited under Mill Rule 7(a). I do take into account, however, the grievant's seniority, her good performance record, the difficult working conditions she had to contend with, and the fact that she resisted three of Berry's requests on January 30 despite her concern that his repeated ap-

proaches would get her in trouble. I am persuaded that she possessed the marijuana for the sole purpose of smoking it herself after work. There is no evidence whatsoever that she used it in the mill and, since she sustained a serious hand injury at work once before and served on the mill safety committee, I credit her statement that she was well aware of the safety reasons for not smoking marijuana at work and never did it. I also take into consideration the fact that Ms. Willoughby was still under EAP treatment when the drug investigation was underway. Granted, agent Berry could not be expected to know that, but the Company knew. If the Company felt it owed an employee a second EAP opportunity where he was both possessing and using alcohol at work to the point of obvious intoxication, it owes at least as much to this employee caught only in possession. Ms. Willoughby's reinstatement, therefore, will include reinstatement to the EAP program.

In sum, balancing the seriousness of drug possession in the mill against the many mitigating factors in Ms. Willoughby's case, I conclude that the fair penalty is a four-month suspension.

Marshall Buhelt

The first question to resolve is whether it is proved beyond reasonable doubt that grievant Buhelt violated Mill Rule 7(a). I find that it is. Needless to say, Mr. Buhelt could not speak for himself at the arbitration hearing, but the evidence against him is overwhelming. Agent Berry was subjected to vigorous cross examination and belligerent interruption by Union counsel, yet his testmony was credible on most counts. I am not impressed by the Union's effort to impeach Berry's testimony with respect to how he "simulated" smoking marijuana with Mr. Buhlet, or by its effort to impeach with evidence that Berry admittedly had some sort of nervous breakdown *after* he completed the S.D. Warren undercover investigation.

Now, was Buhelt "induced" to sell marijuana in the mill by Berry's request? It is difficult to tell without knowing how many times Berry approached Buhelt before November 13, 1983 when the first transaction occurred. Asked for a specific estimate, agent Berry responded somewhat contradictorily that "every time I mentioned it, he sold me some" and "I talked to him about it often." Giving Buhlet the benefit of the doubt, I conclude that Berry asked numerous times, and Buhelt may have been induced.

He was, however, also "predisposed." Bill Carver attested that Buhelt had an evident substance abuse problem and rejected Union advice that he enroll in the EAP. Evidence more convincing on predisposition is found in Berry's reports. First, Buhelt sold Berry marijuana *twice*. It is rare that someone does something he is not predisposed to do more than once. Second, Buhelt offered to bring marijuana in from home when he did not have any with him at work. Third, Buhelt *offered* to take Berry with him to get some after work. Fourth, Buhelt *urged* Berry to smoke with him in spite of Berry's efforts to excuse himself. (CX 10, 11)

If Buhelt was not provoked into violating Mill Rule 7(a), are there other mitigating circumstances which should result in a reduction of the discharge penalty? The Union argues that he had a substance abuse problem and other employees similarly situated have been given last-chance EAP agreements. The Company responds that no causal relationship between Buhelt's apparent drug abuse and his misconduct has been established. I agree with the Company. The record shows that numerous employees with abuse problems have been given last-chance agreements, even where their misconduct has been potentially endangering to other employees, but it appears that their misconduct has stemmed directly from their abuse. Incidents of refusal to obey rules, loud arguments with supervision, inability to stand up, and

the like can be assumed to happen because the employee is under the influence of something; he is "out of control." There is no evidence that Marshall Buhelt was under the influence of drugs when he twice sold marijuana to agent Berry. Berry did not report obvious signs of it, and he did make such observations about other employees, whether credited or not. In sum, I cannot conclude that equitable treatment required the Company to offer a last-chance EAP agreement to grievant Buhelt.

But what of the many suspensions in the record? In the other three grievances, the grievants' misconduct was found to be not such a quantum's leap more serious than that of many employees suspended that discharge was justified. Is grievant Buhelt's misconduct significantly different? I conclude that it is. *He is the only grievant who actively urged—indeed pressured—a fellow employee to use marijuana at work.* I credit agent Berry's testimony that "he tried to get out of it." He knew the dangers smoking would put him in. If he and Buhelt were caught by supervision, his "cover" might be blown. If Buhelt detected his "simulation," the result could be the same. In short, accepting Buhelt's invitation jeopardized the entire investigation Berry had only just begun. I deduce that grievant Buhelt must have been insistent indeed to get Berry to cooperate, and no employer should tolerate this kind of behavior no matter how patient it has been with other kinds of misconduct. Employees may be forgiven for foolishly jeopardizing their own safety and that of their co-workers by possessing or selling marijuana at work, but *pressuring* a coworker into *using* it there cannot be condoned.

For all the aforestated reasons, this grievance is denied.

Summary

As this case has involved four discharges for five separate violations of the Agreement, it has necessarily

entailed a lengthy hearing, lengthy post-hearing briefs—and a lengthy decision by the Arbitrator. Its complexity presented many challenges to all parties concerned, not the least of which was separating the trees from the forest while still finding the correct path out of it! It was mere happenstance that the grievants were part of a large group terminated at the same time for similar, *but not identical*, behavior. The fact that they were terminated as a group should not be allowed to operate against their rights to be heard as individuals and to each have his or her case decided on its own merits. "The halo effect" where one person looks good (or bad) depending on the case standing next to him is something all adjudicators must resist. I have fought that good fight to the best of my ability. Marshall Buhelt's discharge is sustained because he pressured a co-worker into smoking marijuana with him in the mill. Reinstating him (if it were possible) would effectively put back into the mill an employee who would pose an active threat to his fellow workers. The remaining discharges are overturned on ground that they were excessively harsh in light of past disciplinary practice for similarly serious Mill Rule 7 violations. Heavy suspensions are imposed, however, to impress upon the grievants the seriousness of their misconduct. Bringing marijuana into the mill and passing it on to co-workers cannot be viewed as acceptable social behavior. No one knows how a given drug will affect another human being. It was a friend at a party who handed Karen Ann Quinlan the pill which finally killed her. These grievants took the chance that they might be responsible for serious injury when they "helped" Timothy Berry get the marijuana he was after. Loyalty among workers probably precluded their reporting him to management, but "true friends do not let friends drive drunk"—*and they do not help friends at work find drugs.* I feel quite certain that grievants Graham, Denis and Willoughby fully realize this now and will return to work with the determination to be

productive employees which motivated them in the first place.

The grievances of Kimberly, Denis, Debra Graham and Linda Willoughby are sustained. The Company is directed to reinstate each of them with full back pay, seniority and benefits, minus interim earnings, if any, and minus pay for nine months in the case of Ms. Graham, seven months in the case of Ms. Denis, and four months in the case of Ms. Willoughby. The latter deductions shall stand as unpaid suspensions on their records. The Arbitrator shall retain jurisdiction with respect to the remedy for a period of three months from the date of the Award.

The grievance of Marshall Buhelt is denied.

/s/ Suzanne Butler Gwiazda
SUZANNE BUTLER GWIAZDA
Arbitrator

DATED: September 19, 1985

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 87-1570

S.D. WARREN COMPANY,
A DIVISION OF SCOTT PAPER CO.,
Plaintiff, Appellee,

v.

UNITED PAPERWORKERS' INTERNATIONL UNION,
AFL-CIO, LOCAL 1069,
Defendant, Appellant.

Appeal from the United States District Court
for the District of Maine
[Hon. Gene Carter, *U.S. District Judge*]

Before
Coffin, Breyer and Torruella,
Circuit Judges.

Stephen P. Sunenblick with whom *Sunenblick, Reben, Benjamin & March* was on the brief for appellant.

S. Mason Pratt, Jr., with whom *Elizabeth Pearce Hunt* and *Pierce, Atwood, Scribner, Allen, Smith & Lancaster* were on brief for appellee.

May 19, 1988

BREYER, *Circuit Judge.* Appellant, United Paperworkers Union, and appellees, S.D. Warren, have entered into a collective bargaining contract that expressly provides that the "Company reserves the sole right to . . . discharge employees for proper cause." A different agreement between them, embodied in Mill Rule 7, says (in Part A) that "possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs" is "considered cause [for] discharge." The arbitrator in this case stated that he was persuaded "that the Company . . . clearly obtained sufficient evidence that the grievants [whom the Union here represents] are guilty of 7A violations." The arbitrator also "concurs . . . that arbitrators generally consider synonymous the language 'proper cause,' 'just cause' or 'cause.' "

Given the contract's express language and the arbitrator's findings, we must take the following as given:

I. The contract says the "Company reserves the *sole right* to . . . discharge employees for proper cause." (Emphasis added.)

II. The contract should be read as if it said, "violation of Mill Rule 7A is considered [*proper*] *cause* for discharge." (Emphasis added.)

III. The grievants violated Mill Rule 7a.

This court recently held in a companion case, *S.D. Warren Company* v. *United Paperworkers' International Union*, Slip Op. No. 86-1405 (1st Cir. Apr. 21, 1988) (*Warren I*) that this very contract gives the Company the "sole right" to decide whether to discharge an employee who violates Rule 7A, and the contract does not permit the arbitrator to take that right from the Company. In so holding, this court distinguished the recent, similar Supreme Court case, *United Paperworkers Union, AFL-CIO* v. *Misco*, 108 S.Ct. 364 (1987), and there are critical distinctions between *Misco* and the cases before us:

(1) As the Supreme Court pointed out, the issue in *Misco* was not the interpretation of an "exclusive management rights" clause; it was whether the employees had violated Company Rule II.1 (the anti-drug-possession equivalent of Rule 7A). The specific issue was whether, under the contract, the arbitrator could limit the evidence before him to the evidence that had been before the employer at the time of discharge (*i.e.*, could the arbitrator refuse to take account of drugs found in the employee's car after his discharge)—a matter on which the contract was silent. *Misco*, 108 S. Ct. at 371.

(2) The Supreme Court specifically said in *Misco* that its result might have been different had the issue before it there been the same as the issue before us here, namely, whether the contract gives to the Company the *sole right* to discharge one who violates a particular Company rule. The Court wrote:

> The parties, of course, may limit the discretion of the arbitrator . . . and *it may be*, as the company argues, that under the contract involved here, it was within the unreviewable discretion of management to discharge an employee *once a violation of Rule II.1 was found.* But the parties stipulated that the issue before the arbitrator was whether there was "just" cause for discharge and the arbitrator . . .

found that there was not. *Misco*, 108 S. Ct. at 372 (emphasis added).

(3) The contract here more clearly reserves to the Company the power to discharge one who violates the Company rule than did the *Misco* contract. The contract here uses the words "sole right;" as far as the Supreme Court's opinion reveals, the *Misco* contract did not contain similar language. The contract here contains other

clauses also suggesting that, in respect to the cases before us, the arbitrator correctly found a violation of Mill Rule 7A and that the contract means what it says. (Mill Rule 8, for example, unlike Mill Rule 7, lists "Causes for discharge after appropriate warning.")

Given these differences, the arbitrator's findings and the difficulty one has imagining how one could use the English language to state more clearly that the Company retains the prerogative to decide whether or not to discharge one who violates Mill Rule 7, this court has concluded that the contract here falls within *Misco*'s extremely narrow exception permitting a court to find an arbitrator's interpretation of a contract outside the authority delegated to him by the contract. *Misco*, 108 S. Ct. at 371. Given this holding in the companion case (*Warren I*), the arbitrator's findings of Rule 7A violations, substantiated in the record before us, bind the Union here as well. Our examination of the record here reveals no significant difference between this case and the companion case.

The judgment of the district court is, therefore,

Affirmed.

COFFIN, *Circuit Judge*, concurring. I concur in the disposition of this case (*Warren II*) only because the panel opinion in the companion case, *S.D. Warren Company* v. *United Paperworkers International Union*, No. 86-1405, slip op. (1st Cir. April 21, 1988) (*Warren I*), has become the law in this circuit and therefore controls the instant case. Inasmuch as there is no guarantee that there will be a rehearing en banc of *Warren I*, where I could express my views, I choose this vehicle to do so. With all due respect to my colleagues on the panel in *Warren I* and the majority in this case, in my view, the Supreme Court's opinion in *United Paperworkers International Union* v. *Misco, Inc.*, 108 S. Ct. 369 (1987)—reiterating the substantial deference courts must give to the decisions of labor arbitrators—requires that we affirm, rather than vacate, the arbitration awards in *Warren I* and *II*.

I set forth, in some detail, the reasoning of the arbitrator's decision in *Warren II*, which closely tracked that of the arbitrator in *Warren I*. I then turn to an examination of why I believe *Misco* requires a different outcome in both *Warren I* and *II*.

I.

The factual background for *Warren I* is thoroughly documented *S.D. Warren Company* v. *United Paperworkers International Union*, 815 F.2d 178 (1st Cir. 1987), *vacated and remanded*, 108 S. Ct. 497, and needs no repetition here. The parties and the provisions of the collective bargaining agreement at issue in that case and in *Warren II* are identical. In *Warren II*, like *Warren I*, S.D. Warren discharged certain individuals when, as a result of an undercover investigation, it discovered that they had possessed, consumed or sold intoxicating substances on company property in violation of Mill Rule 7(a). The United Paperworkers International Union brought grievances on behalf of the employees,

and, like *Warren I*, the union and the company eventually submitted to arbitration the question of whether the Company violated the collective bargaining agreement in discharging the employees and if so, what should be the remedy.

In both cases, the arbitrator found that the issue presented raised questions concerning the construction of Article 4 and Mill Rule 7 in the agreement.[1] The arbi-

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[1] For the purpose of reference I set forth the language of the two provisions. Article 4, entitled "Management Rights," provided:

> The Company reserves the sole right to manage the business of the Company and its Cumberland Mills operation and to direct the working force. This right includes . . . the right to . . . discipline, suspend or discharge employee for proper cause . . . .

App. at 18.

Mill Rule 7, entitled "Causes for Discharge," provided:

> In any organization, certain rules of conduct must be observed by the members for the good of all.
>
> Violation of prescribed rules are cause for disciplinary action of varying degrees of severity.
>
> Violations of the following rules are considered causes for discharge.
>
> a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. . . .
>
> b) Smoking upon Company's premises except in authorized smoking areas, as provided under "Smoking."
>
> c) Unauthorized destruction or removal of the Company's property.
>
> d) Refusal to comply with Company rules.
>
> e) Willful disobedience or insubordination.
>
> f) Neglect of duty.
>
> g) Disorderly conduct.
>
> h) Dishonesty.
>
> i) Obvious sleeping on duty.
>
> j) Deliberate waste of Company time and/or material.
>
> k) Leaving the Mill while on duty except by permission of Foreman. . . .

[Continued]

trator in *Warren II* concluded that the controlling provision of the contract was Article 4's provision that the company reserved the right to discharge employees for "proper cause." App. at 110. He determined that Mill Rule 7 was a specific provision that modified the company's right to discharge for proper cause, but he agreed with the arbitrator in *Warren I* that the language of Mill Rule 7 concerning such a right was ambiguous. App. at 110-1.[2] Thus, having found any modification of Ar-

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[1] [Continued]

l) Violation of certain rules specifically noted in the Mill Safety Rules.

m) Incarceration after being sentenced.

n) Giving or taking a bribe of any form to obtain work, retain a position, or obtain any preferential treatment whatsoever.

[2] As the district court explained in *Warren I*:

[T]he Arbitrator found that the contract did not unequivocally state that the conduct listed in Mill Rule 7(a) was *proper* cause for discharge as required by the Management Rights [Clause] . . . . She reasoned that, while Rule 7 is entitled "Causes for Discharge," it does not say whether such causes "*will* be" or "*may* be" grounds for termination.

. . . .

The Arbitrator also found that the Company's Safety Policy handbook, albeit a unilateral statement of the Company, did not remove the ambiguity of the Agreement. The handbook states:

> . . . violation of rules printed in red *may* mean immediate discharge. Violations of other rules may be cause for discharge after appropriate warning.

(Emphasis added.) Language [in the handbook] tracking both Mill Rules 7(a) and 8(a), the latter of which, according to the Agreement, requires at least a warning prior to discharge, are printed in red.

Consequently, the Arbitrator concluded that Mill Rule 7 was ambiguous as to whether employees *must* be terminated and that it did not clearly state the agreement of the parties as to what constitutes proper cause for discharge.

[Continued]

ticle 4 by the language in Mill Rule 7 to be unclear, he considered afresh the meaning of the term "proper cause" in Article 4. App. at 111.

To make that determination, the arbitrator in *Warren II* resorted to a test for "just cause," "proper cause," or "cause" for discharge—all of which he found synonymous —that arbitrators generally apply and that the Company recognized, App. at 86-87, as applicable to this case:

> Whether just cause for discharge exists may be determined by answers to the following questions. "No" answer to one or more normally signifies that just and proper cause did not exist.
>
> (1) Did employer forewarn employee of possible consequences of conduct?
>
> (2) Was rule or order involved reasonably related to the orderly, efficient, and safe operation of business?
>
> (3) Before administering discipline, did employer make effort to discover whether employee did, in fact, violate or disobey rule or order?
>
> (4) Was employer's investigation conducted fairly and objectively?
>
> (5) In investigation, did employer obtain sufficient evidence or proof that employee was guilty as charged?
>
> (6) Has employer applied its rules, orders, and penalties evenhandedly and without discrimination?
>
> (7) Was degree of discipline reasonably related to the offense and the employee's record?

App. 111-12. In addition, the arbitrator pointed out that absent express contractual language *mandating* dis-

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[2] [Continued]
S.D. Warren Company v. *United Paperworkers International Union*, 632 F. Supp. 463, 466 (D. Me. 1986). Adopting the rationale of the arbitrator in *Warren I*, the arbitrator in *Warren II* similarly concluded that the language "causes for discharge" in Mill Rule 7 was ambiguous.

charge for egregious conduct or clear agreement/understanding by the parties, consistently effected, that a specific offense warranted discharge upon a first occurrence, arbitrators generally require evidence [that] the employee is incorrigible." App. at 112. The arbitrator in *Warren I* applied similar criteria.[3]

Upon analyzing the evidence before him, the arbitrator in *Warren II* answered criteria 1, 3, 6, and 7 in the negative. Significantly, regarding criterion 6, he analyzed the Company's past practices in terms of the penalties it imposed for Rule 7 violations and found that the company had suspended employees for such violations, after warnings—"the longest suspension was for 6 months and the average 9.7 days." App. at 118. Only in one instance, occurring almost ten years before the Company hired the five employees whose discharges were at issue, had the company ever summarily discharged an employee for a first infraction of Mill Rule 7. Thus, the arbitrator found "the instant discharges for first offenses of Mill [R]ule 7(a) discriminatorily severe." App. at 119. Finding that none of the employees had previously violated Mill Rules or been disciplined for conduct in the workplace, the arbitrator also concluded that the degree of discipline was overly severe (criterion 7). *Id.* The arbitrator in *Warren I* made similar findings concerning the employees in that case upon applying similar criteria. *See* 89 Lab. Arb. at 704.

Having made those findings, the arbitrator in *Warren II* concluded that the employees' conduct was not "proper

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[3] The arbitrator in *Warren I* relied on: (1) the prior practice of the company, including the nature of the penalties for past offenses and the notice or warning given to employees before the imposition of sanctions in those cases, (2) the sufficiency of the evidence presented against each employee, (3) the reasonableness of the penalty imposed in relation to the individual employee's conduct and disciplinary record. *S.D. Warren Co.*, 89 Lab. Arb. (BNA) 688, 701, 710 (Sept. 19, 1985) (Gwiazda, Arb.)

cause" for discharge, and that the Company had, therefore, violated Article 4 in discharging the employees. As a remedy the arbitrator reinstated the employees to their positions. He suggested that some disciplinary action was warranted, but left it to the parties to negotiate the appropriate remedies while retaining jurisdiction in the event that his assistance was called for. The arbitrator in *Warren I*, although similarly finding that the Company did not have "proper cause" to discharge certain employees for conduct violative of Mill Rule 7(a), changed the penalties from discharge to suspension.

II.

In *Misco*, the Supreme Court addressed, in some detail, the general question of "when a federal court may refuse to enforce an arbitration award rendered under a collective-bargaining agreement." 108 S. Ct. at 367.[4] In the course of that discussion, it reiterated longstanding principles concerning the special deference courts owe to the decisions of labor arbitrators. The Court explained:

> [I]t must be remembered that grievance and arbitrating procedures are part and parcel of the ongoing process of collective bargaining. It is through these processes that the *supplementary rules of the plant* are established. As the Court has said, the arbitrator's award settling a dispute with respect to the interpretation or application of a labor agreement must draw its essence from the contract and cannot simply reflect the arbitrator's own notions of industrial justice. But as long as the arbitrator is

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[4] Although certiorari was intially granted for the purpose of considering "the question of when courts may set aside arbitration awards as contravening public policy," the Court devoted the bulk of its opinion to an alternative issue presented to it by the parties: whether the Court of Appeal could properly set aside the arbitrator's award as erroneous. 108 S. Ct. at 369-73.

> *even arguably* construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.

108 S. Ct. at 371 (emphasis added). We have precisely this situation in both *Warren I* and *II*: arbitrators *arguably* construing the agreement and acting within the scope of their authority. This is so because (a) the terms of the agreement pertaining to the Company's right to discharge the employees for their conduct were *arguably* ambiguous and (b) the arbitrators correctly resorted to "supplementary rules of the plant" to construe those terms.

The Arguable Ambiguity in the Term "Causes for Discharge"

In both *Misco* and *Warren I* and *II*, the arbitrators found ambiguity in virtually identical company rules, providing that the possession or consumption of intoxicants on company property by employees would be cause for discharge. At issue in *Misco*, was the paper company's Rule II.1, which—like Mill Rule 7(a), at issue in *Warren I* and *II*—"listed as causes for discharge: 'Bringing intoxicants, narcotics, or controlled substances into, or consuming [same] in the plant, or on plant premises.'" 108 S. Ct. at 368 n.2 (quoting App. to Pet. for Cert. 31a). The Supreme Court pointed out that the arbitrator in *Misco* thought Rule II.1 was ambiguous as to whether it required immediate discharge for an infraction. The Court said: "the arbitrator . . . cryptically observed that Rule II.1 merely listed causes for discharge and did not expressly provide for immediate discharge." 108 S. Ct. at 372-73. Similarly, in both *Warren I* and *II*, the arbitrators found that it was unclear whether the language in Mill Rule 7(a) meant that any violation of the Rule would invariably be penalized with discharge.

In light of the *Misco* arbitrator's recognition of the ambiguity in Rule II.1, the Supreme Court said that although "it may be . . . that under the contract . . . it was within the unreviewable discretion of management to discharge an employee once a violation of Rule II.1 was found . . . [b]efore disposing of the case on the ground that Rule II.1 had been violated and discharge was therefore proper, the proper course would have been remand to the arbitrator for a definitive construction of the contract in this respect." 108 S. Ct. at 372-73. I read this passage to convey the message that it is up to the arbitrator, in the first instance, to construe the language of the collective bargaining agreement pertaining to the appropriateness of any particular sanction for violations of work rules.[5] Given the fact that the arbitrators in *Warren I* and *II* found similar ambiguity in Mill Rule 7(a), I believe that *Misco* directs us to defer, in the first instance, to the arbitrators' interpretations of that Rule and to set those interpretations aside only if there is no arguable basis for them.

The question we must ask, then, is whether there was an arguable basis for the arbitrators' determinations, in *Warren I* and *II*, that the term "causes for discharge" in Mill Rule 7—which the arbitrators viewed as language that could modify the Company's right to discharge for "proper cause" in Article 4—was ambiguous. If so, we must then consider whether the arbitrators' construction of the term "proper cause" in Article 4 had an arguable basis in the parties' agreement.

Having reviewed the arbitrators' decisions, I believe they reasonably could find that Mill Rule 7 was ambig-

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[5] The majority apparently reads the earlier part of this quoted language to suggest that *Misco* presented no issue concerning the scope of the arbitrator's authority, and even if it did, the Court might reach the same result as the panel in *Warren I* and the majority in this case, *see* slip. op. at 3-4 (point (2)). I disagree with that reading since it takes, in isolation, only one part of the pertinent passage. *Compare id. and* 108 S. Ct. at 372-73.

uous. First, there were three contradictory phrases in the rule. It is titled "Causes for Discharge," but it then states, on the one hand, that "Violations of prescribed rules are cause for disciplinary action *of varying degrees of severity*," and, on the other, that "Violation of the following rules *are considered* causes for discharge. . . ." (Emphasis added.) *See supra* note 1. The "following rules" are then listed (a) through (n) and range from pernicious conduct, such as "[i]ncarceration, after being sentenced," (m), to conduct that is not so egregious, like "[u]nauthorized destruction or removal of the company's property," (c), which, technically, would include inadvertently breaking or removing a company pencil. *Id.* Given the language of the rule and the variations in severity of the conduct covered, I do not think it was unreasonable for the arbitrators to conclude that the rule does not unambiguously provide that any and all violations of Rule 7(a) would invariably be penalized with discharge. Second, the arbitrators found this ambiguity reinforced by the Company's own Safety Policy handbook, which stated that the conduct addressed in Mill Rule 7(a) *may* result in immediate discharge. *See supra* at pp. 8-9 & note 2. Third, upon analyzing past practices of the Company for violations of Mill Rule 7, the arbitrators discovered that, in virtually every instance, the Company warned employees before taking disciplinary action and penalized employees with suspension, not discharge. App. at 117-18; 89 Lab. Arb. at 699. For all these reasons, it was not unreasonable for the arbitrators to conclude that Mill Rule 7(a) was ambiguous. Having determined that the language of that rule was not clear in its modification of Article 4, the arbitrators were then free to construe the Company's right to discharge "for proper cause." [6]

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[6] The majority seizes upon language in the arbitrator's decision, where—after determining that Mill Rule 7 is ambiguous and he must therefore construe the term "proper cause" in Article 4—he

"Supplemenetary Rules of the Plant"

In *Misco*, the Supreme Court noted that the arbitrator looked to the same seven criteria for determining whether the Company violated the collective bargaining agreement upon discharging the employee that the arbitrators applied in *Warren I* and *II*. *Misco*, 108 S. Ct. at 368 & n.5.[7] Those seven criteria have become accepted standards for arbitrators' determinations of the propriety of management's discharge of employees. At least in the paper industry—as evidenced by their use in the *Misco* and *Warren I* and *II* arbitrations—these criteria

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states that he concurs with the Company that *arbitrators generally* consider synonymous the language "proper cause," "just cause," or "cause." The majority concludes from this that logic leads inescapably to the conclusion that "proper cause" in Article 4 must be identical to the items that "are considered causes for discharge" in Mill Rule 7. This construction overlooks the arbitrator's finding that the language in Mill Rule 7 does not provide that every violation will invariably result in discharge. Thus, one side of the equation, "causes for discharge," is ambiguous. Moreover, the arbitrator did not say that *he construed* "proper cause" to be the same as "cause" *for the purposes of construing Mill Rule 7 together with Article 4*. He said only that *arbitrators generally* view the terms synonymous in the context of the seven-part test they apply for deciding whether there was cause for discharge in any particular case. In other words, once the express terms of the contract covering discharge are ambiguous, as they are in this case, arbitrators turn to a seven-part test to determine whether there was "cause," "just cause," or "proper cause" for discharge —viewing those terms as synonymous. If "cause" happens to be the word used in the contract, arbitrators will still apply the test for "just cause" or "proper cause"; fairness always plays a role in the construction of the term.

[7] The Court pointed out that the "arbitrator based his finding that there was not just cause for discharge on his consideration of seven criteria: . . . the reasonableness of the employer's position, the notice given to the employee, the timing of the investigation undertaken, the fairness of the investigation, the evidence against the employee, the possibility of discrimination, and the relation of the degree of discipline to the nature of the offense and the employee's past record." *Id.*

are established supplementary rules that guide arbitrators' construction of collective bargaining agreements. Indeed, in *Warren II*, the Company itself argued for the application of these criteria. App. at 86-87. Through the application of these criteria, the arbitrators in *Warren I* and *II*, like the arbitrator in *Misco*, correctly took into consideration "supplementary rules of the plant" to reach the conclusion that the Company did not discharge the employees for "proper cause."

The two criteria standing out perhaps most clearly in this regard are those calling for an assessment of the Company's past practices regarding sanctions imposed for violations of Mill Rule 7 and consideration of whether the severity of the discipline is reasonably related to the offense and the employee's record. Taking into consideration those criteria in *Warren I* and *II*, the arbitrators, in each case, decided that the Company lacked "proper cause" to discharge the employees for their conduct. Since those arbitrators legitimately could consider those criteria as "supplementary rules of the plant" in assessing the Company's right to discharge the employees under the collecive bargaining agreement, *Misco*, 108 S. Ct. at 371, I see no reason to overturn their awards.

In sum, given the arguable ambiguity in the contract concerning the Company's right to immediately discharge employees under Mill Rule 7, the Company's past practices and other considerations specific to the plant, the arbitrators, in *Warren I* and *II*, *arguably* could have decided that the employees' violations of that rule were neither "causes" nor "proper causes" for discharge. I would conclude that, in both cases, the arbitrator was "arguably construing or applying the contract and acting within the scope of his authority." *Misco*, 108 S. Ct. at 371. Therefore, the fact that we might be "convinced he committed serious error does not suffice to overturn his decision." *Id.*

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 86-0226-P

S. D. WARREN COMPANY,
Petitioner

v.

UNITED PAPERWORKERS INTERNATIONAL UNION,
AFL-CIO LOCAL, 1069,
Respondent

CARTER, District Judge

MEMORANDUM OF DECISION AND ORDER ACCEPTING MAGISTRATE'S RECOMMENDED DECISION

Presently before the Court are the Magistrate's recommended Decision and Respondent United Paperworkers International Union, AFL-CIO, Local 1069's objections thereto. For the reasons stated herein, the objections are overruled, the Recommended Decision is accepted, and the underlying arbitration award will be vacated.

The factual background is adequately presented in *S.D. Warren Company v. United Paperworkers Int'l Union, AFL-CIO, Local 1069*, 632 F. Supp. 463 (D. Me. 1986), *rev'd and remanded*, No. 86-1405, slip op. (1st Cir. Mar. 31, 1987), and thus need not be repeated here. *S.D. Warren* involved the discharge of paper mill employees after an undercover drug investigation disclosed violations of Mill Rule 7(a), which proscribes the possession, use or sale of drugs or alcohol on mill premises.

An arbitrator found that suspension rather than discharge was the appropriate remedy for some of the employees; this Court affirmed the award, but the First Circuit reversed, holding that the collective bargaining agreement unambiguously gave S.D. Warren the right to discharge violators of Mill Rule 7(a).

The instant case involves five other employees—Hudson, Anderson, MacDonald, Rondeau, and Jensen—discharged under the same circumstances. Arbitrator Theodore Role found that the company violated the collective bargaining agreement by discharging the five; S.D. Warren has petitioned to vacate the award. The Magistrate, concluding that the First Circuit's ruling in *S.D. Warren* governed the instant case, has recommended that the petition for vacatur be granted. The Union having filed objections to the Magistrate's Recommended Decision, this Court must now make a *de novo* determination of the disputed matters. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

The Union first attempts to distinguish the First Circuit's *S.D. Warren* ruling on the ground that in the instant case Arbitrator Role did not find that grievant Hudson had committed the act for which S.D. Warren discharged him. The record reflects that S.D. Warren's stated reasons for discharging Hudson were that while at work on December 22, 1983, he (1) was observed drinking liquor and appeared intoxicated and (2) had offered alcohol to an undercover agent posing as an employee. Arbitrator Role stated in his award that he was not convinced that Hudson had consumed alcohol or appeared intoxicated, but he did conclude that Hudson had violated Mill Rule 7(a) by knowingly making it possible for a fellow employee (the agent) to consume alcohol on company premises. Hudson having violated Mill Rule 7(a), and the First Circuit having decided that S.D. Warren had the contractual right to discharge such violators, the Union's first objection is without merit.

The Union's second argument is that S.D. Warren, rather than discharging grievants Anderson and MacDonald, was required by the collective bargaining agreement to admit them to the company's Employee Assistance Program (EAP) for employees with substance abuse problems. As support for this argument, the Union relies on a 1983 award by another arbitrator on the grievance of one Greenlaw. That grievance involved the same parties and the same collective bargaining agreement as in the instant case. The *Greenlaw* award stated that "[t]he denial of a referral into a rehabilitation program, such as EAP, where such referrals have been made in the past for other similarly situated employees, would indicate that proper cause for discharge was lacking." The Union appears to argue that Arbitrator Role must have accepted this interpretation of the collective bargaining agreement, because he ordered the reinstatement of grievants Anderson and MacDonald on the condition that they participate in the EAP.

The Union correctly points that that although the First Circuit ruled in *S.D. Warren* that the agreement unambiguously gave S.D. Warren the right to discharge violators of Mill Rule 7(a), neither the parties nor the First Circuit discussed whether, under *Greenlaw*, employees with substance abuse problems must be offered a place in the EAP before being discharged. The *S.D. Warren* decision thus does not foreclose the Union from arguing that Arbitrator Role's award conditionally reinstating Anderson and MacDonald is consistent with the Greenlaw award and thus valid.

The flaw in the Union's argument is that Arbitrator Role did not base his award on the *Greenlaw* award or the reasoning contained therein. The grounds upon which Arbitrator Role found that S.D. Warren lacked good cause to discharge Anderson and MacDonald were *not* that S.D. Warren had failed to offer them places in the EAP, but rather that S.D. Warren had (1) failed to

forewarn the employees that they were subject to discharge for a first Rule 7(a) offense; (2) before imposing discipline, failed to make efforts to discover whether the employees had in fact violated the Mill Rules; (3) failed to apply its rules, orders, and penalties even-handedly and without discrimination; and (4) failed to impose a degree of discipline reasonably related to the seriousness of the offense and each employee's record. Finding no just cause for discharge, Arbitrator Role instructed the parties to negotiate appropriate lesser penalties; only when the parties indicated that they were unable to agree did Arbitrator Role issue a second award ordering Anderson's and MacDonald's reinstatement and participation in the EAP.

Clearly, then, the arbitrator did not interpret the contract to require S.D. Warren to offer substance abusers a place in the EAP before discharging them. And it would be improper for this Court to substitute such an interpretation for the one the arbitrator actually relied upon; it is the arbitrator's interpretation, rather than this Court's, for which the parties bargained. The arbitrator's finding of "no just cause" having nothing to do with participation in the EAP, that finding is flatly inconsistent with the First Circuit's *S.D. Warren* decision. The Union's second objection is thus without merit.

It is therefore *ORDERED* that the Union's objections to the Magistrate's Recommended Decision are *OVERRULED*, the Recommended Decision is *ACCEPTED*, and Arbitrator Role's award is *VACATED*.

/s/ Gene Carter
GENE CARTER
United States District Judge

Dated at Portland, Maine this 28th day of May, 1987.

APPENDIX H

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

Case Number: 1130-0909-84

IN THE MATTER OF THE ARBITRATION BETWEEN

UNITED PAPERWORKERS INTERNATIONAL UNION,
LOCAL 1069, AFL-CIO

—and—

S.D. WARREN COMPANY, A DIVISION OF
SCOTT PAPER COMPANY

Grievances: Discharge of
David R. Rondeau
Harry R. Hudson
Michael W. MacDonald
Peter W. Jensen, Jr.
Gary W. Anderson

AWARD OF ARBITRATOR

The Undersigned Arbitrator(s), having been designated in accordance with the arbitration agreement entered into by the above-named Parties, and dated June 1, 1983-May 31, 1985, and having been duly sworn and having duly heard the proofs and allegations of the Parties, Awards as follows:

The Company did violate the Collective Bargaining Agreement in discharging David R. Rondeau, Harry R. Hudson, Gary W. Anderson, Michael W. MacDonald and Peter W. Jensen, Jr.

Remedies—In addition to reinstatement, as delineated on page 49 of the attached opinion and award.

The Arbitrator retains jurisdiction until September 1, 1986 in the event his assistance is needed to finalize the remedies. Extendable upon application by either Party.

/s/ Theodore Role 6/24/86
Arbitrator's signature (dated)
Theodore Role, June 24, 1986

STATE OF)
) SS.:
COUNTY OF)

On this —— day of ————————, 19—, before me personally came and appeared to me known and known to me to be the individual(s) described in and who executed the foregoing instrument and he acknowledged to me that he executed the same.

The undersigned Arbitrator was selected by the Parties in accordance with their Agreement for the period June 1, 1983—May 31, 1985.

Hearings were held in Westbrook, Maine on February 3, 4, 17, 18, 25, and April 8, 1986.

The United Paperworkers International Union, Local 1069, AFL-CIO, hereinafter referred to as the "Union" was represented by Stephen P. Sunenblick, Esquire, Portland, Maine.

The S.D. Warren Company, a division of Scott Paper Company, hereinafter referred to as the "Company"/ "Employer" was represented by S. Mason Pratt, Jr., Esquire, Portland, Maine.

* * * *

The Arbitrator submitted "Records of Hearings" to the American Arbitration Association, Boston, Massachusetts on February 5, 20 and April 9, 1986.

On May 13, 1986, upon receipt of the Parties' briefs, A.A.A. Labor Tribunal Administrator Kandice A. Schromm declared the proceedings closed.

The Issue

The Parties agreed the issue to be decided by the Arbitrator is as follows:

> Did the Company violate the Collective Bargaining Agreement in discharging David R. Rondeau, Harry R. Hudson, Gary W. Anderson, Michael W. MacDonald, and Peter W. Jensen, Jr.?
>
> If so, what shall be the remedy?

Background

The S.D. Warren Company, a division of the Scott Paper Company in Westbrook, Maine, produces, at its Cumberland Mills, magazine quality coated papers.

* * * *

On or about October 10, 1983 as result of earlier rumors about drug activities in the mill the Company hired Timothy Berry ("Al" Berry) an undercover investigator. He started as an entry level employee. Agent Berry reported his activities and results of his investigations to Lt. Gary Snow, Commanding Officer of the Maine State Police Drug Unit. Information forwarded to the Company's top Management.

On February 15, 1984, in accordance with the decision he and then Mill Manager Mr. Henry Roehner made, and in the presence of a Union official, Mr. Peter Malia, Industrial Relations Manager, gave Messrs. David R. Rondeau, Michael W. MacDonald, Harry R. Hudson, Peter W. Jensen, Jr., memoranda, Exhibits J-13, 14, 15, 16 respectively, as follows:

> Pursuant to Appendix A, Section 7. a) (Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs.) of the current Collective Bargaining Agreement, this is to certify that effective February 16, 1984, you are hereby terminated as an active employee of S.D. Warren Company.
>
> Whereas you have been employed for less than 10 years, you are not entitled to vested pension rights. Your Group and Life Insurance Policies will also terminate on February 16, 1984.
>
> This letter also serves as notice that you are entitled to convert your Medical and Life Insurance to an individual policy, and if interested, you should notify this office as soon as possible.
>
> The Payroll Department will be advised to forward to your address any unused 1984 vacation.
>
> If you have have any questions, please do not hesitate to call my office.
>
> (signed) Peter J. Malia

The memorandum given Mr. Gary W. Anderson differed from the foregoing only with respect to the first paragraph as follows (Exh. J-17):

> Pursuant to the contractual provisions dealing with possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs, this is to certify that effective February 16, 1984, you are hereby terminated as an active employee of S.D. Warren Company.

That same day (February 15, 1984) all five (5) men filed Grievance Reports, Exhibits J-8, 9, 10, 11 & 12, claiming—"Improper Discharge", "Violation of Appendix A-7 and any other part or parts of the Contract related to this grievance". "Immediate reinstatement" and/or "Make whole" were indicated as "Settlement Desired".

On April 23, 1984, Mr. Bedford C. Hayes, Director of Safety and Security, issued the Company's grievance procedure "Step III Answer" to Mr. Rondeau as follows (Exh. J-8, p. 3):

> It has been the Union's stated position in this case, that the termination of David Rondeau, for possession of marijuana in the Company's parking lot, is not a discharge offense. It is the Company's position that the discharge of David Rondeau was appropriate to Appendix A, Section 7 (a), which clearly states that possession of marijuana on *Mill property* is cause for discharge. Grievance denied.

and to Mr. MacDonald as follows (Exh. J-9, p. 3):

> Though the Union admits that use of marijuana in the Mill is a serious offense, termination of employment (in the Union's view) is not appropriate in this instance. The uncontested facts of this case are that, Michael MacDonald did possess and use marijuana on Company property, on 2/6/84 and 2/9/84. Termination of employment for these offenses is

clearly established as cause for discharge, under Appendix A, Section 7 (a) of the Labor Agreement. Grievance denied.

and to Mr. Jensen as follows (Exh. J-10, p. 3):

It has been the Union's stated position in this case that, Peter Jensen, Jr., did not in this instance possess, nor has he ever possessed marijuana on Mill property, nor has he engaged in the sale of marijuana on Mill property. Accordingly, the Union has, in this instance, asked for full reinstatement of employment with back pay.

The facts brought forward in this case are, that Peter Jensen, Jr., did in fact possess and engage in the sale of marijuana on Mill property on 12/5/83. It is the Company's position, therefore, that the discharge of Peter Jensen, Jr., is in full compliance with Appendix A, Section 7 (a) of the Labor Agreement. Grievance denied.

and to Mr. Anderson as follows (Exh. J-11, p. 3):

Although the Union admits that possession and use of marijuana in the workplace is a serious infraction, termination in their view is too severe. The Company's uncontested facts are that Gary Anderson did possess and use maijuana, on Mill property, in clear violation of Appendix A, Section 7 (a), of the Collective Bargaining Agreement. Grievance denied.

There is no Step III Answer affixed to Mr. Hudson's Grievance Report copy (Exhibit J-12) submitted to the Arbitrator. The Union claimed there had been. The Company indicated none had ever been issued. Since Mr. Hudson was not reinstated, the Arbitrator concludes Mr. Hudson's grievance had, in effect, also been denied by the Company.

* * * *

The foregoing led, ultimately, to the instant arbitration hearings.

Relevant Contract and Safety Policy Provisions

The Parties indicated the following provisions of their Agreement (Exh. J-1) and Safety Policy (Exh. J-7) are pertinent to the instant issue:

ARTICLE 4—*Management Rights*

> The Company reserves the sole right to manage the business of the Company and its Cumberland Mills operation and to direct the working force. This right includes but is not limited to the right to plan, direct and control all mill operations; . . . and except as expressly modified by specific provision of this Agreement, the right to select, hire, assign, promote, demote, transfer, discipline, suspend or discharge employees for proper cause or to relieve them from duties because of lack of work or for other legitimate reasons.

APPENDIX A—*Company Policies and Mill Rules*

> 7. *Causes for Discharge*—In any organization, certain rules of conduct must be observed by the members for the good of all.
>
> Violation of prescribed rules are cause for disciplinary action of varying degrees of severity.
>
> Violations of the following rules are considered causes for discharge.
>
> a) Possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs. The possession or use of a specific narcotic, or drug properly prescribed by a licensed physician is the only exception to this rule.

b) Smoking upon Company's premises except in authorized smoking areas, as provided under "Smoking".

c) Unauthorized destruction or removal of the Company's property.

d) Refusal to comply with Company rules.

e) Willful disobedience or insubordination.

f) Neglect of duty.

g) Disorderly conduct.

h) Dishonesty.

i) Obvious sleeping on duty.

j) Deliberate waste of Company time and/or material.

k) Leaving the Mill while on duty except by permission of Foreman. (Regular members of Westbrook City Fire Department or Westbrook Rescue Squad, may be excepted as detailed in Section titled "Fire Department").

l) Violation of certain safety rules specifically noted in the Mill Safety Rules.

m) Incarceration, after being sentenced.

n) Giving or taking a bribe of any form to obtain work, retain a position, or obtain any preferential treatment whatsoever.

8. *Causes of Discharge After Appropriate Warning*

a) Reporting for duty under the influence of alcohol or narcotics.

b) Reading unauthorized material while on duty.

c) Repeated failure to report for duty without good and sufficient reason.

d) Failure to report injuries to Foreman, and when so instructed, to Medical Department.

e) Habitual lateness in reporting for work.

f) Failure to wear and/or use prescribed protective clothing, devices or equipment.

g) Failure to follow safe work practices.

ARTICLE 12—*Grievance and Arbitration*

Section 6. The arbitrator shall have no power to render a decision which in any way adds to, subtracts from, or modifies any provision of this Agreement.

Safety . . . Policy . . . Standards (Exh. J-7)

26. *Intoxicants—Liquor or Drugs*

a. Bringing in or consuming liquor or drugs on Company property is absolutely forbidden.

b. An employee will not report to work under the influence of liquor or drugs.

c. If an employee is suspected of being under the influence of liquor or drugs, the Company may require a medical examination by the mill physician.

Note: Those employees who may have a problem in this area are encouraged to seek assistance through the Employee Assistance Program.

(The heading 26. Intoxicants . . . etc . . . and rules a. and b. are printed in *red ink to emphasize their special importance.*)

The Company's Position

"There is no dispute that each of the grievants, MacDonald, Anderson, Rondeau, Hudson and Jensen violated Mill Rule 7A . . ."

> . . . each in turn admitted that he violated Mill Rule 7A . . . each admitted he knew Mill Rule 7A and that what he did constituted a dischargeable offense.
>
> (Company's brief p. 2)

* * * *

Michael MacDonald

Company Exhibits No's. 1 & 2 are Record of Investigation reports of Special Agent Timothy Berry with reference to his observing Mr. MacDonald smoke marijuana cigarettes at the Company plant on February 6 and February 8, 1984.

> MacDonald did not deny that he smoked marijuana on both occasions. He admitted that his duties involved work with dangerous machinery, including the guillotine knife, the fork truck and skill saw. MacDonald even wore a safety harness at times on his job. He testified that he was aware of the rules against possession, use and sale of drugs or alcohol in the mill, the safety rules, and that what he did was a dischargeable offense . . .
>
> MacDonald admitted he personally brought marijuana joints into the mill a number of times before February 5, 1984, and that on February 9, 1984, he, MacDonald, lit the joint, that Berry "didn't twist his arm" to do it. In fact, MacDonald testified he was using marijuana on a regular daily basis and bringing it to the mill on a daily basis. (Employer's brief pp. 3-5)

* * * *

Gary Anderson

Company Exhibits No's. 3 & 4 are Record of Investigation reports of Special Agent Berry with reference to his observing Mr. Anderson having possession of and

smoking marijuana at the Company plant on December 27, 1983 and on February 6, 1984.

> Anderson admitted both incidents, and that he at that time possessed a pipe which he brought to work with him; the pipe, he testified, "looks like a door wedge", and is specifically designed to smoke marijuana. He admitted that he had smoked marijuana in the mill a few times. Anderson admitted asking Officer Berry if he had some marijuana he could purchase. He admitted that he asked Berry to smoke in the plant . . . He admitted that during the February 6, 1984 incident, he, Anderson, was the one who produced the joint that was smoked on that occasion.
>
> Anderson was aware of the mill rule against drugs in the mill, because he read it in the contract, and "also it is common knowledge throughout the mill". He also knew that it was a dischargeable offense . . .
>
> (Company's brief pp. 7 & 8)

* * * *

David Rondeau

Company Exhibit No. 5 is a Record of Investigation report of Special Agent Berry with reference to his witnessing David Rondeau purchase an amount of marijuana from Mr. Miller Hunt in the Company's parking lot.

> Testimony . . . has established that Miller Hunt, who is among the twelve discharged employees, was a regular dealer in marijuana and cocaine in and out of the mill. Rondeau admitted he knew Hunt and that he pre-arranged this meeting with Hunt in the S. D. Warren parking lot for the express purpose of purchasing marijuana . . . and that it was purchased for his wedding guests . . .
>
> Rondeau was a second hand on No. 26 cutter in the finishing department. He described the safety

hazards in his area, including moving machinery and the possibility of a 2,000 to 4,000 pound roll falling off a machine. Rondeau admitted he violated Mill Rule 7A and that this was a dischargeable offense . . .

(Company's brief p. 9)

* * * *

Harry Hudson

". . . there is no factual dispute that Mr. Hudson violated Mill Rule 7A." Officer Berry's report concerning Harry Hudson for Thursday, December 22, 1983 was as follows (Exh. C-7):

"At approximately 1330 hours, this agent was over by No. nine coater when this agent was approached by a guy who introduced himself as MIKE and who had a coffee cup in his hand. (MIKE appeared to be somewhat intoxicated; he usually wears a baseball cap and works at the main room end of number ten coater). MIKE and this agent spoke for a while and this agent asked him what he had in the cup. MIKE replied it was sprite and vodka and wanted to know if this agent wanted a drink. This agent said 'sure' and MIKE said he would be right back. Approximately three minutes later MIKE returned with a paper cup and handed it to this agent and said, "Come back later and I will give you another drink." This agent said okay. This agent then tasted the drink which MIKE had given this agent—this agent said, "It's a little strong isn't it." MIKE said, "We make them that way so we don't have to have too many, that way the foreman won't get suspicious, if we had a cup in our hands too often they might get suspicious. MIKE then returned to number ten coater and when he was out of sight this agent went over and poured the beverage down the water fountain.

> At approximately 1415 hours, this agent went back to number ten coater and brought a small container of orange juice which this agent had purchased at the cafeteria. This agent asked MIKE if he had any more drinks available and he said to follow him. MIKE and this agent went over to the lockers under number ten coater and MIKE pulled out a bottle of vodka and poured some into this agent's orange juice container. This agent thanked MIKE and returned to the main room and tasted the orange juice—it was definitely vodka. Then (sic) agent then walked over to the men's room and emptied the container into the urinal and flushed it.
>
> At 1450 hours this agent stopped by to see Mike again. This agent told Mike this agent was leaving and wished him a "Merry Christman" (sic).
>
> At this point MIKE seemed even more intoxicated, his face being flushed and eyes were red . . .

"Harry Hudson's version of the events in question is strangely parallel to Officer Berry's, but Hudson denied drinking alcohol in the Mill."

> Hudson claims he volunteered to Officer Berry the information that he had a bottle of alcohol in his locker, in the context that he had received it as a Christmas gift, because, according to Hudson, they were talking about the Christmas season. Hudson claims Berry then asked him for a drink, and Hudson told Berry to "help himself", whereupon, he says, Berry did.
>
> According to Hudson's version, Berry asked again for another drink, and, once again, Hudson told him to "help himself" to the bottle in his locker. Hudson claims that Berry asked a third time, and Hudson indicated he could take a third drink from his bottle in his locker which was unlocked.

> Hudson admitted he knew this was a violation of Mill Rule 7A which was a dischargeable offense. He admitted that as much as one-half of the bottle was consumed within the Mill premises.
>
> Hudson testified that, because of "rumors" about alcohol at Christmas time, he didn't think he was doing anything wrong at the time. Yet, he admitted that there was never any custom, to his knowledge, of drinking in the Mill or opening bottles in the Mill.
>
> (Company's brief pp. 12-14)

". . . Office Berry's testimony and report clearly establish that Hudson *was* drinking alcohol on the job."

* * * *

Peter Jensen

Company Exhibit No. 6 is a Record of Investigation report of Special Agent Berry with reference to his accepting a quantity of marijuana from Peter Jensen for which he "handed him a $20.00 bill."

> Jensen was a material handling trucker and had worked in the Mill for about two years . . . As a material handling trucker, he hauled rolls of paper weighing from 1,000 to 6,000 lbs. Jensen was well aware of the safety concerns involved in that job. . .
>
> Jensen had attended an orientation where they talked about safety and alcohol and drugs in the Mill. He had seen a number of the notices put up about drugs or alcohol in the Mill. . .
>
> Jensen admitted telling Berry when they were at Jensen's home that he would get him some pot. Jensen also admitted the facts contained in paragraph 8 of Officer Berry's report as to how the transaction occurred in the mill. . .

> Jensen admitted he used pot, and that he and Berry talked about pot before the transaction occurred. He was aware of the mill rules and that the transaction violated Mill Rule 7a. But he claimed there was nothing wrong with it because he didn't make money on the deal. . .
>
> (Company's brief pp. 28-30)

* * * *

"The Company did not violate the Contract because the grievants clearly admitted violating Mill Rule 7A which is 'cause for discharge" and the Company acted within the range of it's discretion."

> The language of the contract clearly and unambiguously gives the Company the discretion whether to discharge for violation of the rule. The Arbitrator may not substitute his discretion for that of the Company where, as here, the Company has acted within the range of its discretion and the Union has failed to show the Company's actions were arbitrary, capricious or in bad faith.
>
> . . . Arbitrator Gwiazda correctly ruled that the contract reserved to the Company the discretion whether or not to discharge for a violation of Mill Rule 7A and that discharge is not mandatory under that rule. Joint Exhibit 2 at p. 20. In so ruling, Arbitrator Gwiazda correctly construed the Management's Rights clause, reserving to the Company the right to discharge for proper cause. . . .
>
> Arbitrators universally recognize that "cause", "proper cause", "just cause", or other formulations of cause, amount to the same thing.
>
> (Company's brief pp. 30 & 31)

"The Contract is clear and unambiguous—violations of Mill Rule 7A are cause for discharge and therefore within the Company's discretion to discharge."

> Where the language of an agreement is clear and unequivocal, the arbitrator must enforce the clear meaning. . .
>
> "While custom and past practice are used very frequently to establish the intent of contract provisions which are so ambiguous or so general as to be capable of different interpretations, they ordinarily will not be used to give meaning to a provision which is clear and unambiguous."
>
> (Elkouri at 408, 409)
>
> (Company's brief pp. 33 & 34)

"Article 12, Section 6 (see page 5) provides—'The Arbitrator shall have no power to render a decision which in any way adds to, subtracts from or modifies any provision of this Agreement'."

> This Arbitrator should follow the Gwiazda interpretation that discharge is discretionary, not mandatory, and that such discretion resides in the Company.
>
> (Company's brief p. 35)

"Arbitrator Fleming James, Jr., addressed the same contract language here at S.D. Warren ten years before Arbitrator Gwiazda, in the context of a discharge for theft under Mill Rule 7D (now 7C) (See Company Exhibit 58, hereinafter called the "James Award")."

> Arbitrator James clearly recognized and stated the limitations upon his jurisdiction or power under the contract.
>
> . . . The inquiry in this case is limited to whether or not the Company acted within the range of its rights or discretion. . . . in this case the Company has indeed acted within the range of its rights or discretion.
>
> (Company's brief pp. 37 & 38)

* * * *

"The Union has failed to show that the Company's actions were arbitrary, capricious, invidiously discriminatory or in bad faith.'

> . . . the Company has more than amply demonstrated its justification, for the manner in which it responded to the substance abuse problem at its Mill.
>
> Despite longstanding Company rules clearly prohibiting the use, sale or possession of drugs or alcohol in the workplace and making such offense a cause for discharge, the Company became aware that a drug problem existed in the mill. The Company's first response was to educate—the Company conducted extensive education programs in the late 1970's concerning the Company's employee assistance program, the dangers involved in abuse of drugs and alcohol and the Company's strict rules . . . Once again in 1981 the Company provided extensive drug education programs for Employees, Managers and Union representatives . . . Company Exhibit 27, an article in the "Warren's Standard" newsletter for Spring, 1981, summarizes the 16 sessions for safety committees, first line supervision, Union leaders and "anyone interested", including demonstrations of drug paraphernalia and talks by Officer Wayne Syphers of the Westbrook Police Department and talks by Roger Barr director of the Company's employee assistance program. Although the Company's strenuous drug and alcohol education programs were initially effective, it is evident that the problem remained and began to intensify. In 1983 the Union specifically advised the Company at a 3rd step grievance meeting that the Company had a drug problem in the Mill and confronted the Company with the need to 'do something" about it . . . Although the Company had previously posted notices about its clear mill rule, additional notices were posted for all

> employees. Through joint efforts, the Union also sternly warned employees in its Union newsletter of October 1983. The Company turned to the professionals; following the advice of Officer Syphers of the Westbrook Police Department, it contacted the Maine State Police Drug Investigation Unit. The Maine State Police recommended an undercover investigation. The Company cooperated.
>
> (Company's brief pp. 38 & 39)

"S. D. Warren Company is not alone among employers in the nation who are striking back against the drug and alcohol crisis in the work force."

> Company expert Peter B. Bensinger eloquently explained the scope of the substance abuse problem nationally, and especially as it exists today in the work place. Bensinger served for five and a half years as director of the United States Drug Enforcement Administration and is in a position to know . . . His article "Drugs in the Work Place" published in the *Harvard Business Review* . . . and the excerpt from HEW's 1980 Report to the U.S. Congress entitled "Marijuana and Health" . . . among other sources, details the scope of the problem nationally. . .
>
> As Bensinger explained, when S. D. Warren was confronted by the Union with the fact that a serious substance abuse problem existed in the Mill, the Company had a *duty* to act and the Union suggested that the Company should do something about it. Bensinger said the Company acted responsibly in contacting the Westbrook police. . .
>
> Peter Bensinger testified that, in his opinion, the Company properly and reasonably relied upon the State Police for the conduct of this investigation. . .
>
> (Company's brief pp. 39 & 40)

"Bensinger also testified concerning the effects of marijuana use on the body."

> As Bensinger explained, even minor use of marijuana can have a delayed reaction in the human body because it is stored in the fatty tissues of the brain. If it severely impacts the performance of an aircraft pilot, it also affects the performance of Mill employees who work with dangerous equipment. . .
>
> (Company's brief p. 42)

"Every grievant testified his job involved *substantial safety risks.*"

* * * *

"Mill Rule 7A is reasonable and is rationally related to the orderly, efficient and safe operation of the business of S. D. Warren Company of Westbrook, Maine."

> . . . the rule has been repeatedly communicated to all Mill employees so that it is well known to all. Every grievant has testified that he or she knew Mill Rule 7A and also knew that it was a dischargeable offense. It has been a longstanding rule, dating back to at least as early as 1950 . . . "it is common knowledge" in the mill . . . is reiterated in the Company's safety manual. Most importantly, the employees have been forwarned of the existence of the rule, and the serious consequences likely to ensue from its violation, by repeated notices from both the Company and the Union.
>
> As early as October 30, 1981, the following notice to all S. D. Warren employees was posted (Company Exhibit 8):
>
> THROUGHOUT THE YEARS, THIS MILL AND ITS EMPLOYEES HAVE ESTABLISHED MANY MILL RULES WHICH ARE INTENDED TO PRODUCE PROPER CONDUCT AS WELL AS FAIR AND CONSISTENT WORK PRACTICES IN THE MILL.

FROM TIME TO TIME, IT BECOMES NECESSARY TO REMIND ALL EMPLOYEES OF SOME OF THESE RULES, ESPECIALLY THOSE WHICH CAN LEAD TO SERIOUS PROBLEMS FOR BOTH THE COMPANY AND INNOCENT EMPLOYEES, AS WELL AS SEVERE DISCIPLINARY ACTION—INCLUDING DISCHARGE FOR OFFENDERS.

TWO SUCH MILL RULES HAVE BEEN DISCUSSED NUMEROUS TIMES IN GENERAL NOTICES TO EMPLOYEES AND ONCE AGAIN WE WISH TO REMIND ALL EMPLOYEES THAT ANY PERSON VIOLATING THESE RULES WILL BE DISCHARGED.

1. THEFT OF COMPANY PROPERTY
2. REPORTING TO WORK UNDER THE INFLUENCE OF DRUGS OR BRINGING DRUGS INTO THE MILL FOR USE, SALE OR DISTRIBUTION.

ALTHOUGH THIS NOTICE IS BEING DISTRIBUTED AS A GENERAL NOTICE, WE REALIZE THAT IT ACTUALLY APPLIES TO VERY FEW EMPLOYEES. THE MAJORITY OF OUR EMPLOYEES ARE NOT THIEVES, DRUG USERS OR DRUG DEALERS—THEREFORE THIS NOTICE IS NOT INTENDED FOR THEM BUT IS AIMED DIRECTLY AT THE OFFENDERS WHO MUST REALIZE THAT WE CANNOT AND WILL NOT ALLOW THESE DISHONEST OR ILLEGAL ACTIONS TO OCCUR AND REFLECT UNFAVORABLY ON THIS MILL AND ITS EMPLOYEES.

(Company's brief pp. 43 & 44)

And on October 4, 1983 the Company published the following notice (Exh. C-9):

ALL OF US MUST RECOGNIZE THAT THE USE, SALE, AND POSSESSION OF ILLICIT DRUGS IS A PROBLEM IN ANY ENVIRONMENT, ESPECIALLY THE WORKPLACE. FAILURE TO RECOGNIZE, AND COMBAT THIS PROBLEM EFFECTIVELY, ONLY LEAVES THE DOOR OPEN TO THAT SMALL MINORITY WHO VIOLATE THE LAW, AND MILL RULES, WHICH ARE DESIGNED TO PROTECT ALL OF US FROM EXPOSURE TO THE OBVIOUS DANGERS OF SUCH ACTIVITY.

THIS NOTICE IS ISSUED TO REMIND ALL EMPLOYEES THAT WE ARE COMMITTED TO THE CONCEPT, THAT ILLICIT DRUGS OR INTOXICANTS WILL NOT BE TOLERATED IN THE WORKPLACE, WHETHER BY USE, POSSESSION, SALE OR REPORTING UNDER THE INFLUENCE. SUCH INFRACTIONS MAY LEAD TO IMMEDIATE DISCHARGE.

PLEASE TAKE THE TIME TO READ AND UNDERSTAND THIS MESSAGE, AND MORE IMPORTANTLY—HELP US TO KEEP *OUR* WORKPLACE FREE OF DRUGS AND INTOXICANTS.

(Company's brief p. 45)

The Union newsletter for October 1983 states, in part pertinent (Exh. C-11):

> *Once again* it is necessary to *remind everyone* that *the use of illegal drugs and/or alcohol is a very serious offense. The company has notified the union that anyone caught possessing and/or using drugs or alcohol on company property will be immediately terminated. And their position is very strong on this.* The union can only hope that everyone will follow these rules and not jeopardize their job, their families, or the safety of their fellow workers. We

already had two employees discharged this past summer. (Emphasis supplied)

(Company's brief p. 45)

A December 16, 1983 notice stated (Exh. C-10):

Recently an employee entered a closed, locked shop area, used a saw which is restricted for "Authorized Personnel Only", and amputated parts of three fingers. While the bodily injury was certainly sad and needless, the pain and suffering accompanying the termination of this employee was also very regretable. It is an extremely difficult time for both the employee and the Company.

We must remind ourselves that Mill Rules, including unauthorized use of equipment, possession/use/sale of alcohol or other drugs, and theft of Company property, cannot be ignored. They apply to all employees, hourly or salaried, and we must expect full understanding, acceptance, and compliance by everyone.

Failure to comply with these specific rules will result in termination. (Emphasis supplied).

(Company's brief p. 46)

". . . both the Company's and the Union's repeated notices have consistently warned employees of the serious consequences at violating Mill Rule 7A".

. . . the clear evidence . . . convincingly demonstrates, not only that employees are well aware of the rule and what it states, but also that the Parties themselves mutually understand and support the rule. The Company is entitled to rely upon the Parties' mutual understanding over the years.

(Company's brief pp. 46 & 47)

". . . the Company's efforts to establish that, in fact, the grievants violated the mill rule was substantial and in good faith."

> The Company did not rely upon subjective conclusions of other employees or supervisors. Instead, the Company relied upon State Police Officials Lt. Gary Snow and Sgt. Norman Auger to hire and direct a trained agent to carry out the investigation . . . The State Police investigation was conducted fairly and objectively; none of the police officers or agents involved had any personal bias or reason not to tell the truth—they had "no axe to grind".
>
> The evidence overwhelmingly demonstrates the Company acted in good faith and within the proper scope of its discretion. (Company's brief pp. 49 & 50)

* * * *

"Even if the Contract were not clear and unambiguous there is no relevant mutual and binding past practice requiring leniency for Mill Rule 7A violations."

> . . . every single one of the prior disciplinary actions introduced into evidence by the Union relates to an entirely different infraction or offense from that at issue here; not a single prior case involved discipline for a Mill Rule 7A violation . . .
>
> . . . disciplinary actions under other unrelated mill rules are not relevant or probative in a situation such as this because this is a case of first impression . . .
>
> The *only* prior case in this record involving discipline for violation of *Mill Rule 7A* resulted in *discharge.* Roy Pinette testified, without rebuttal, that Howard Langzell was *discharged* in the late 1960's for drinking on the job. (Company's brief pp. 51 & 52)

". . . the Company specifically rebutted the Union's claims that the Company's "leniency" despite "serious" violations constitutes a mutually binding past practice."

> . . . the Company's reasons for exercising its discretion in disciplinary matters may be varied, including concerns for labor management relations, or the need to clear up existing matters before contract negotiations. In some cases, the Company expressly chose to waive its rights in the particular case . . .
>
> . . . the Company has always been strict on cases involving theft and incarceration and . . . has almost uniformly discharged employees incarcerated for any substantial period of time, regardless of the seriousness of the offense. (Company's brief pp. 57 & 58)

". . . the Company's exercise of its discretion under Mill Rule is handled on a case by case basis . . . every case is handled on its own merits."

> There are no prior cases involving violations of Mill Rule 7A. *Therefore, there is no relevant past practice whatsoever*, except for Roy Pinette's prior discharge of Langzell for drinking on the job. (Company's brief pp. 59 & 60)

"The Company is entitled to weigh the seriousness of each infraction and . . . to determine the degree of discipline, so long as it is not arbitrary, capricious or discriminatory."

> It is not for an arbitrator to say that sleeping on the job and smoking are equally unsafe, or to weigh the relative seriousness of different kinds of offenses, so long as the Company's exercise of discretion has not been arbitrary, capricious or in bad faith . . .
>
> . . . if the record reveals any pattern or practice at all, it is that the Parties have consistently, in good faith, attempted to settle grievances *wihout precedent or prejudice* to future cases. Company's brief pp. 61-63)

Not a single one of the eighty-four (84) exhibits introduced en masse by the Union on the Sixth and last day of the hearings in this case (Exhibits U-126 through U-210) involved a Mill Rule 7A violation.

* * * *

. . . The Grievants are not entitled to reinstatement because the discharges were for proper or just cause."

Company's actions meet the tests for "just cause" laid down by this Arbitrator in *Martin-Brower Co.*, 78 L.A. 236 (Role 1982).

(1) The employer forwarned employees of the, not just possible, but likely serious consequences of their conduct.

(2) Clearly, the rule *is* reasonably related to the orderly, efficient and safe operation of the business. See, *e.g.*, Company Exhibit 42, showing estimated losses due to substance abuse at S. C. Warren's mill of more than $3,000,000 *annually*, based on national statistics.

(3) The employer went to *substantial* lenths to discover whether the employees did, in fact, violate or disobey the rule. That fact was overwhelmingly established by the independent and objective State Police investigation, and is confirmed by the grievants' own admissions.

(4) The investigation conducted by the employer through the Maine State Police was fair, objective, thorough and professional. Industrial Relations Manager Peter Malia was, according to the Company's expert police witnesses, fully justified in relying upon it. The consistent past practice has been for the Company *not* to interview other employees represented by the Union. The Company involved the Union as soon as possible . . . and thoroughly reviewed the facts with the Union before and during the grievance procedure.

(5) The Company clearly obtained sufficient evidence that the employees were guilty as charged; that proof established beyond a reasonable doubt the existence of the violations.

(6) The Company has applied its rule, Mill Rule 7A, and penalties even handedly and without discrimination.

(7) The degree of discipline is reasonably related to the seriousness of the events, and the employees' records. None of the grievants is a long-term "senior" employee at S. D. Warren Company. Finally, there are no extenuating circumstances involved in their conduct, unlike the three female grievants in the Gwiazda award who were found to be in a vulnerable position as female minorities in an all male work force. (Company's brief pp. 67 & 68)

". . . There is no evidence in this case . . . of extenuating circumstances . . ."

* * * *

"There *are* significant credibility questions in this case."

1. Michael MacDonald and Gary Anderson should not be credited where their testimony differs from Officer Berry's . . . MacDonald denied he insisted Officer Berry smoke marijuana; clearly, MacDonald was the moving party here, and his refusal to accept the word "insisted" smacks of the same narrow definitional cop-out he used in denying the racing incident. Clearly, Dr. Bishop and Officer Berry must be credited on the racing incident as to both MacDonald and Anderson.

2. Rondeau's testimony that he never smoked marijuana was inherently incredible. Rondeau asks this Arbitrator to beileve that he would take the pains to arrange a meeting on Company premises

with a known dealer in the mill (subjecting himself to serious risks) just to make a buy for his "wedding guests" while he, the bridegroom, supposedly abstained—this strains one's credulity to the breaking point . . .

3. Peter Jensen, Jr. did not deny the facts in paragraph 1 of Berry's report, including the fact that he told Berry that he was "thinking about getting another quarter pound of marijuana, as that's how he purchases it". Jensen said paragraph 2 of the report was accurate. He disagreed with paragraph 3, saying that Berry brought up drugs, not him . . . Jensen testified that paragraph 4 was accurate. As to paragraph 6, he denied saying he gets marijuana from Vermont and sells it for $30 per ounce. But Jensen admitted volunteering to get some pot for Berry. He said paragraph 6 was accurate. He denied paragraph 7, denying that he asked Berry if he were still interested in buying some weed . . .

Officer Berry should be credited on these small discrepancies, but in any event, none of the discrepancies matter.

(4) The reasons for crediting Officer Berry and not Harry Hudson are compelling:

1. Mr. Hudson has a great deal to lose in reputation with his wife, family, friends, fellow workers, and in the community, by admitting that he drank alcohol on the job.

2. Officer Berry had nothing to gain by reporting the Hudson incident. In fact, it is uncontroverted that Berry first sought advice from his superior, Lt. Snow, *before* reporting the incident to the Company. Berry reported it only when so directed by Lt. Snow.

3. Berry's report (and testimony) is detailed and thorough. It contains small but telling facts, *e.g.*, Hudson was referred to as "Mike"; he wore a baseball cap; he carried a paper cup; the cup contained sprite and vodka; Hudson approached him. The report contains quotes, it contains precise times, these times stand up and these facts appear accurate.

5. Officer Berry's report of the incident makes sense and Hudson's story does not, it appears contrived. After all, it was Christmastime and Hudson claims that the Christmas bottles were a tradition. If Hudson erred in judgment in giving three drinks to Berry (to which he admits), there is no reason to believe that he could not make a similar mistake in judgment in taking drinks on the job in a manner which was virtually impossible for management to detect. If Hudson would offer three drinks to a total starnger in the mill, if Hudson saw nothing wrong with getting an unknown truckdriver tipsy on the job, despite his knowledge of the mill rules, there is no reason in logic why Hudson would not have taken a drink himself. Aside from the logic of Berry's story, there is the illogic of Hudson's. Why would Hudson approach a total stranger in the mill and volunteer that he had a bottle of alcohol in his locker? Why would Berry, according to Hudson's version, comment on how strong the drink was if Berry himself had poured it?

Hudson does not deny having the appearance of being intoxicated . . .

Police officers are trained to observe symptoms of intoxication. Notice Hudson's version fails to account for Officer Berry's claim that, at the end of the day, "Mike seemed even more intoxicated, his face being flushed and eyes were red"—this at "14:50 hours" or 2:50 in the afternoon, long after any so-called wash-up occurred.

> Particularly disturbing are the inherent inconsistencies between Hudson's and Gouzie's testimony. Hudson says he unwrapped the bottle in Gouzie's presence as soon as he got it, just because he was curious, then put it away in his locker. Gouzie says he didn't. He never observed anyone unwrap a bottle, and Hudson's locker was locked 99% of the time. What then accounts for the open locker on that particular day, unless it was Hudson's decision to take a drink? Hudson never claimed he had to specially unlock it just for Berry . . .
>
> The fact that Berry's report is contemporaneous is very significant. None of the grievants, including Hudson, had any reason to recall the events until their significance suddenly became apparent on February 16, 1984. In Hudson's case, this was almost two months after the fact. In addition, Officer Berry was there for the express purpose of noting and observing improper behavior. His immediate query to his superior, Lt. Snow, and Snow's directions that he report it to the Company, heightened the importance of the incident to Berry and can be expected to have caused Officer Berry to report the facts accurately. (Company's brief pp. 76-80)

"In *Walker Manufacturing Company*, 81 LA 1169 (1983) Arbitrator Morgan upheld a discharge in a case which is directly on point under almost identical circumstances." See also *Alcolae Chemical Corp.*, 55 LA 306 (Roberts, 1970); *Boise Cascade Corp.*, 74 LA 1012 (Bowles, 1980).

* * * *

Officer Timothy Berry and Lt. Gary Snow "were trained police officers who were given a job to do."

> Officer Berry received extensive training in drugs, including marijuana and undercover drug investigations, at the Military Justice Academy. He had been

> a Chief of Police for seven years and was personally involved in prior drug cases. He therefore had special competence in marijuana cases and undercover operations. He also had special competence in detecting intoxication by alcohol. Expert police witness McClaren confirmed the indicia upon which Berry relied to determine Hudson's intoxication. There was no serious deviation or variance in Berry's testimony as to the incidents involved here. His memory was accurate and specific. Indeed, his testimony was remarkably consistent with his contemporaneous reports. (Company's brief p. 87)

See also, *Maverick Tube Co.*, 86 LA 1 (Miller, 1985); *Combustion Engineering Inc.*, 70 LA 318 (Jewett, 1978); *Pepsi-Cola Bottlers*, 68 LA 792 (Klein, 1977); *Howmet Corp.*, 60 LA 1160 (Sembower, 1963).

> Arbitration cases are not in point here where the company has failed to provide sufficient evidence to establish the offense by clear and convincing evidence or beyond reasonable doubt, because in this case each of the grievants has admitted his wrongdoing. Also not in point are cases involving violations off company premises, or where the company has failed to adequately notify employees. Similarly, not in point are cases involving inconsistent or discriminatory company action. Here all of its grievants were given the shame level of discipline; had the company exercised leniency towards some but not all, it would have been open to criticism. (Company's brief p. 89)

"Where, however, as in this case, there is a violation of a clearly published company rule involving drugs or alcohol on company premises, arbitrators generally sustain the discharge." See *Stansteel Corp.*, 69 LA 776 (Kaufman, 1977); *General Portland Cement Co.*, 58 LA 1299 (Marshall, 1972); *United States Steel Corp.*, 62 LA 146 (Friedman, 1974); *Pacific Telephone & Telegraph Company*, 56 LA 1101 (Hughes, 1971); *Jeep*

Corp., 67 LA 828 (Keefe, 1976); *Green Co.*, 65 LA 1233 (Cushman, 1975); *Mississippi River Grain Elevator*, 62 LA 200 (Marcus, 1974); *Isaacson Structural Company*, 72 LA 1075 (Peck, 1979)

* * * *

"The Arbitrator bears a heavy burden of responsibility for the future safe operations of the Mill. This is perhaps the single most important case this Company has ever faced."

> Any responsible employer must have genuine concern in this day and age, when over 60% of 18 to 25 year olds have experimented with marijuana and/or cocaine (see HEW 1980 Report, Company Exhibit 36), and almost *half* of that age group in the State of Maine are regular users (see Report of Marijuana in Maine, Company Exhibit 37). Thus, S. D. Warren has a right to be concerned about deterring such conduct in the workplace, because of legitimate concerns about the safety and well being of the Company's employees, the Company's own productivity, and the assurance of the product quality so critical to its customers and future survival. (Company's brief p. 92)

"Does the Arbitrator really want to substitute his judgment concerning the degree of importance of *that issue*, regardless of the Arbitrator's own personal views?"

> Peter Bensinger testified that if these employees are reinstated, this would adversely impact the Company's policy, that discharge for admitted violators is an important deterrent to other violations. The Bensinger Affidavit attached to Joint Exhibit 30 cogently states the Company's concerns:
>
> "The reinstatement of admitted drug traffickers to their former jobs at the S. D. Warren Mill (despite their admitted violations of the mill rule against

use, sale or possession of drugs on the company premises) would seriously and irreparably harm the company's drug policy and program." (Company's brief p. 93)

* * * *

"The Company's discipline should not be set aside because of procedural technicalities."

Nothing in the collective bargaining contract or in arbitral decisions suggests that to discipline admitted wrongdoers is invalidated because the Company did not investigate adequately. If a company's investigation falls short in the sense that it fails to gather necessary facts, the company suffers the risk it will fail in arbitration . . . there is no material evidence the Company failed to develop. Thus, the whole issue is completely moot. (Company's brief p. 95)

"The Union apparently contends that some sort of pretermination hearing was required under the contract."

We are at a loss to understand where in the contract such a requirement exists . . . that the Company has *never* made it a practice to interview bargaining unit employees in arriving at disciplinary decisions . . . any procedural deficiency is made moot by the grievants' admissions that they are guilty of violating the contract. (Company's brief pp. 97 & 98)

"Here there is no contractual requirement for a pretermination hearing . . ."

. . . the Company has complied fully with the grievance procedures in the contract. Indeed, the Company here went beyond the terms of the contract to give the grievants' representatives, including their counsel, the opportunity to hear all of the facts, including Officer Berry's reports and to ask ques-

tions of Officer Berry and his supervisor, Sergeant Auger.

In addition, the Union has failed to demonstrate, even if there were a contractual requirement underpinning their procedural due process arguments, that the grievants have in any way been *prejudiced* from the manner in which the discharges were handled. See, *e.g.*, *United Engineering and Foundry Co.*, 37 L.A. 1095, 1097 (Kates 1962). (Company's brief p. 101)

"For the same reasons the court, in *Misco Inc. v. United Paperworkers International Union* 768 F.2d 739 (1985), refused to uphold an arbitrators award reinstating . . . because of . . . procedural due process rights, the Arbitrator in this case should not reinstate the grievants because of narrow due process arguments."

* * * *

"None of the grievants can escape the consequences of his admitted violation of Mill Rule 7A providing for immediate discharge for use, possession or sale of drugs on Company premises by now seeking refuge in the Employee Assistance Program . . ."

The program is neither expressly nor impliedly made a part of the collective bargaining agreement. That program encourages employees voluntarily to seek help for personal *problems*, including alcoholism and drug abuse, affecting their *work performance*. Employees are encouraged to seek *treatment* if they have such a problem which is affecting their attendance, safety or productivity. (Company's brief pp. 103 & 104)

". . . the Company has the contractual right to discharge employees for their misconduct, *even though* they might have been eligible for referral to EAP at the time of their discharge." See AAA case No. 1130-1175-82, Joint Exhibit No. 6.

> Not every user of drugs or alcohol is an *abuser* or has a so-called *drug or alcohol abuse problem affecting their work performance.* Otherwise, every social drinker could bring alcohol into the mill with impunity, knowing the Employee Assistance Program would bail them out before reaching the discharge mode. (Company's brief p. 112)

* * * *

". . . for all the reasons stated herein, the discharges must be upheld."

> The grievants admittedly violated Mill Rule 7A which is cause for discharge . . . The Arbitrator may not substitute his judgment for that of the Company . . .
>
> The Company reasonably responded to the Union's demand for action against a serious drug problem. Even if the contract were not clear and unambiguous, there is no relevant mutually binding past practice requiring leniency for violations of Mill Rule 7A. In any event, the Company had proper cause; the Company acted for good reasons, there are no extenuating circumstances here, and the credibility of the Company's witnesses, as well as the importance of deterring drugs and alcohol in the workplace, preclude reinstatement. The investigation was fair, objective and professional and the grievants cannot escape their consequences due to procedural technicalities in the absence of express contractual language . . . (Company's brief p. 114)

The Union's Position

"The tactics employed by "Al" Berry are pretty much set out in the Gwiazda Arbitration Decision."

> Similar tactics were used in the present cases. They all included a common thread. He informed employees that he smoked marijuana and utilized

marijuana on and off Company premises. He presented himself in a disheveled manner, and appeared on several occassions under the influence of alcohol or marijuana. He repeatedly requested that individuals smoke marijuana with him on Mill premises and in some instances asked grievants numerous times to bring him marijuana onto Mill premises. To achieve success, he befriended fellow employees, to the point where he would leave work with them, have drinks with them in local taverns, and go to their homes, all with a design to induce them to bring him marijuana on Company premises. (Union's brief p. 4)

* * * *

Harry Hudson

"At the time of his termination, Harry Hudson had worked at S. D. Warren Company approximately six years."

He was considered an excellent employee with an excellent work record and well respected by his supervisors and superiors. Prior to his summary termination from employment, he had not been disciplined by any of his foremen and supervisors . . .

On December 22, 1983, Harry was working the 7:00 a.m. to 3:00 p.m. work shift. The crew produced paper until the No. 10 Coater machine malfunctioned around 10:30 a.m. This machine remained "down" for approximately two hours . . . After repairs were made on the machine, the crew again produced paper throughout the rest of the shift . . . throughout the course of the afternoon of December 22, 1983, Harry had conversations with (foreman) Maynard Jensen regarding the quality of the paper the crew was producing (U-124). At no time did the foreman notice anything unusual about Harry's demeanor or any other factor that

would lead him to believe that Harry had had a drink of alcohol or was under the influence of alcohol.

At around 1:00 p.m. on that day the First Hand, Phil Gouzie, in accordance with long-standing custom and practice at S. D. Warren . . . gave each member of his crew a pint bottle of alcohol as a Christmas present. This present was to show his appreciation for the crew's good work during the course of the year, as the hard work of the crew was directly related to how much bonus each of the individual crew members would make on a weekly basis. Harry immediately placed his "Christmas Bottle" in his locker. He did not open the bottle. At around the same time, Harry ate his lunch . . . At this same approximate time, Harry encountered "Al" Berry. He was sitting over by a conveyer and Harry approached him. He had the cup in his hand. A conversation began which eventually led to talk about Christmas. Harry told "Al" Berry that he had just received a bottle of vodka as a Christmas present from his crew boss. After a short time Harry left and went back to his work station. In a few minutes "Al" Berry approached him, told him that he could really use a drink and asked Harry to go and have a drink of alcohol. Harry refused. "Al" Berry asked him again for a drink, for himself this time. Harry refused again, but upon Berry's third request, Harry finally told him where the bottle was located and that he could help himself if he had to. "Al" Berry thereafter poured himself a drink from Harry's Christmas present and left. After a short period of time transpired, Berry returned with two orange juice containers and poured himself another drink from the Christmas bottle, and left one container by the machine. On a third occasion, Berry again returned just before the end of the shift . . .

. . . At around 3:00 p.m. Harry had a conversation with Phil Gouzie while walking out of the mill together and thereafter drove home with him . . . Phil Gouzie did not notice any factor which would indicate that Harry had something alcoholic to drink or was in any way under the influence of alcohol or intoxicated . . . . unrebutted testimony was that Harry doesn't drink hard liquor and hardly ever drinks any alcoholic beverage at all.

Ted Perry, a fellow crew member . . . stated that he had had contact with Harry on and off during the entire afternoon of December 22, and walked back to the lockers with him at the end of the shift. He saw nothing, whether by way of actions or demeanor or otherwise, to indicate that Harry had had a drink of alcohol or was in any way under the influence of alcohol or intoxicated at any time during that day.

. . . the Company undertook no independent investigation into the matter. If they had, all the testimony that was adduced by the Union at the hearing would have been uncovered, including that of Maynard Jensen, and the Company would have realized that the allegations made against Harry Hudson were mistaken . . .

In addition to the lack of corroboration of Berry's allegations, is the affirmative evidence . . . seriously implicating Berry with drinking on the job activity on December 22, 1983 and either drinking or being under the influence of marijuana in early February, 1984. (Union's brief pp. 4-8)

* * * *

David Rondeau

"David Rondeau is 26 years old. At the time of his termination he had worked at S. D. Warren for approximately four years."

He was considered an excellent employee with an excellent work record and had received no previous discipline.

On November 26, 1983 David Rondeau purchased a small amount of marijuana from Miller Hunt in the S. D. Warren parking lot approximately two feet from the public sidewalk . . . . he made this purchase from his truck and immediately drove away. It was David's day off from work and he did not otherwise enter or remain on mill property.

His purchase of marijuana was the single purchase David made in his lifetime . . . He purchased the marijuana for use by friends at his upcoming wedding . . . he had contacted Miller Hunt to sell him the marijuana because it was widely known in the mill that Miller Hunt had the reputation and capacity to furnish marijuana.

Once receiving "Al" Berry's report regarding David, no further investigation was undertaken to ascertain his versions of the events or to determine if he posed any risk to the company . . . David doesn't smoke or otherwise use marijuana . . . some of the statements attributed to him by Mr. Berry are extremely suspect . . .

David was also summarily discharged without any opportunity to give an explanation of his version of the events. (Union's brief pp. 9 & 10)

* * * *

Peter Jensen

"Peter Jensen is now 25 years old . . . At the time of his termination he had worked at the Mill for approximately three years."

He had an excellent work record and had not received any previous discipline.

When "Al" Berry was sent to Material Handling, he was trained by Peter. They worked side by side each day for approximately two weeks and "Al" Berry befriended Peter Jensen. During the course of this period of time and after befriending Peter, "Al" Berry repeatedly asked Peter for marijuana. Every time he made this request, he would ask if Peter would bring him the marijuana on Mill premises as otherwise it would be extremely difficult for him to pick it up.

. . . Peter brought in some marijuana for Mr. Berry and received $20.00 from him, which is the amount he had given Miller Hunt to obtain the marijuana . . .

Peter Jensen succumbed to Mr. Berry's persistent requests. This purchase of marijuana was solely to accommodate Mr. Berry. Prior to that one occasion, Peter had never possessed or otherwise used marijuana on Mill property. He did not gain from the transaction with Berry.

. . . Mr. Berry's report was misleading due to inaccuracies and omissions. For example, the report would have the reader believe that Mr. Berry had only asked Peter for marijuana on that particular day. However, he had been asking every day for a week or so and had been informed that he could probably get some marijuana from Miller Hunt, a person who Berry already knew possessed and most likely used marijuana on Mill property . . . "Al" Berry . . . made . . . repeated requests for Peter to bring him drugs in his capacity as a friend and fellow employee.

(Union's brief pp. 11 & 12)

"An extremely important aspect of this case is Berry's drinking habits and large consumption of alcohol."

* * * *

Michael MacDonald

"At the time of his termination Michael was 26 years old . . . he had worked at the Mill for approximately four years."

> . . . he had an excellent work record and had not received any prior discipline.
>
> Michael was terminated for his use of marijuana on Company premises . . . With respect to his personal use of marijuana he was very candid . . . admitting that he had smoked marijuana on the day in question with "Al" Berry and had done so on other occasions by himself. At no time, however, did he ever "insist" that Mr. Berry smoke marijuana with him. In fact, it was Mr. Berry who asked him to smoke marijuana on Company premises on several occasions.
>
> . . . He testified that during this period of time in which he admitted smoking marijuana on Company premises he was undergoing a great deal of stress in his personal life which was carrying over to his work life. Given his own admission regarding the events of February 9, 1984, there seems little doubt that Michael's use of marijuana had become a problem which was manifesting itself not only outside of work but inside the work place as well.
>
> Dr. (John) Bishop (professional psychologist) believed that Michael was a good candidate for the EAP. Although one cannot guarantee results, he was of the view that Michael stood a substantial chance of improving his problem with consequent reduced marijuana use or even abstinence with enrollment into the EAP. His MMPI testing reflected Michael's personal vulnerability to substance abuse which only could be interrupted with counselling and constructive treatment . . .

Michael also was summarily terminated. . . .

(Union's brief pp. 13 & 14)

* * * *

Gary Anderson

"At the time of his termination, Gary Anderson was 30 years old. He had worked at S. D. Warren for approximately three years."

> . . . he had an excellent work record and had received no prior discipline. His summary termination grew out of the same marijuana incident involving Michael MacDonald as well as another incident on December 27, 1983. At no time did he ever "insist" that "Al" Berry smoke marijuana. He candidly admitted that he asked Berry if he wanted to smoke marijuana with him but, contrary to Berry's report, Berry was more than willing to oblige.
>
> Gary was also evaluated by Dr. Bishop. This evaluation in addition to an actual history revealed that Gary had had a long time drug abuse problem. There can be little doubt that this problem was manifesting itself at work since Gary also admitted to using marijuana at work on occasions other than those which involved Mr. Berry and for which he was charged. He also quite candidly referred to his family and work-life problems and how these situations were leading to stress and increased use of marijuana as a crutch. . .
>
> Dr. Bishop believed that, despite Gary's past usage of drugs, he would make a good candidate for the EAP and that successful completion of such a program would lead to reduced use or no use of drugs at all. Gary was also summarily terminated by S. D. Warren without any investigation into the underlying circumstances surrounding his marijuana use.

(Union's brief pp. 15-17)

* * * *

"The Grievants were not given any opportunity to explain their version of the events."

> . . . They were simply read a termination letter . . . and were informed that there was nothing they could say that would make any difference. This action was based solely on "Al" Berry's uncorroborated reports to the Company.
>
> (Union's brief p. 17)

"Unlike prior discipline issued by the Company, no investigation of the underlying facts was ever undertaken . . ."

> . . . it was their practice under the terms of the Agreement to investigate the facts before meting out discipline under Section 7 or Section 8 of the Collective Bargaining Agreement . . . This investigation would occur when information was brought to their attention by a fellow employee.
>
> (Union's brief p. 18)

* * * *

"The meaning of Section 7 has been interpreted in a prior arbitration award and is binding on this arbitration proceeding, pursuant to the final and binding provision of the Collective Bargaining Agreement."

> . . . Article 12 Section 4 of the Collective Bargaining Agreement unequivocally states that the decision of the Arbitrator hearing a grievance as to the meaning and/or application of the Collective Bargaining Agreement is "final and binding." As a final and binding decision it becomes engrafted onto the agreement for the parties to manage their subsequent affairs.
>
> (Union's brief p. 19)

"Even asuming that this Arbitrator should find the principle of "final and binding" inapplicable the evidence in the present proceeding regarding the practices

of the parties under Section 7 overwhelmingly supports the interpretation of the Collective Bargaining Agreement isued by Arbitrator Gwiazda."

> The evidence included the numerous forms of progressive discipline issued under Section 7 of the Collective Bargaining Agreement, even for alcohol related offenses prior to 1979 when reporting to work under the influence of alcohol was then Section 7(b). It also included EAP agreements and announcements and notices regarding safety rule violations, as well as prior arbitration awards. This extensive documentation reveals a solid history of applying progressive discipline under all provisions of Section 7, whether involving alcohol, sleeping on the job, disorderly conduct or any other violation of mill rules, including safety rules. It reveals that most every department supervisor and foreman has been involved in this progressive discipline system for an extensive period of time.
>
> . . . the Company never distinguished alcohol related rule transgressions from other rule transgressions under Section 7 and treated all Section 7 violations the same, with a system of oral and written warnings, suspensions and many times mandatory enrollment in the EAP program and a failure to adhere to that program's rules, before discharge was imposed. (Union's brief pp. 23 & 24)

"Arbitrator Gwiazda did not accept the Company's argument that marijuana related offenses should somehow be treated differently under Section 7 than either alcohol related ones or other offenses in Section 7:

> Her decision is supported by the arbitration case law . . . *Mallinckrodt Inc.*, 80 L.A. 1261 (1983) (Marshall Seidman) . . .
>
> The Company contended that marijuana use should be treated as more serious than that of alcohol. The

> arbitrator, after reviewing the remedies of arbitration decisions for a ten year period involving the use of drugs, disagreed. He stated the general concerns that can be expressed regarding marijuana are also true of alcohol. Both were stimulants and/or depressants, both were psychological crutches, the use of both can lead to more serious consequences, alcoholism on the one hand, hard drugs on the other, and the use of both probably is tied to an underlying psychological condition. He concluded that the analogous penalty for possession and/or use of intoxicants on company premises should be the guide and determined that this comparison would lead him to award ordinarily a seven day suspension. (Union's brief pp. 24-25)

"Progressive discipline under Section 7 is also borne out by prior arbitration awards."

* * * *

"Of significance is the fact that there existed multiple alcohol related offenses, many times committed by the same employee and no discharges were received, except for . . . and then only after multiple transgressions related to alcohol abuse and two failures in the EAP Program."

> In addition to these examples of multiple violations of Section 7 who were not terminated or even suspended in some instances, there are many employees who received discipline under Section 7 of the former agreement for alcohol related offenses. . . ."

> Several employees were entered into the EAP as discipline for alcohol related offenses, in some cases as a mandatory condition of continued employment. . . . All of these cases involved substance abuse in one form or another. In addition to these cases, the Union Exhibits 121(a) through 121(t) reveal enrollments into the EAP for transgressions of Section

7(d), (e), (f) and (m) as well as for absenteeism and failure to report to work due to alcohol abuse. (Union's brief pp. 27-29)

* * * *

"Absent corroboration, the testimony of Agent Berry should not be credited or given enough weight to meet the Company's heavy burden of proof in a discharge case, and therefore the grievance of Harry Hudson should be sustained as not being for just and proper cause and various aspects of the testimony of Agent Berry with respect to the other grievants should be rejected."

Arbitrator Gwiazda applied a beyond a reasonable doubt standard for determining whether the grievants in fact had committed the offenses as alleged. No less a standard should be applicable to the present grievances, since being terminated as they were constitutes a badge of infamy which will affect them throughout their work life.

Other arbitrators have expressed their concern with respect to the quantum and type of proof necessary to sustain a termination involving drugs and/or alcohol. Almost without exception, these arbitrators require a high standard of proof and refuse to rely on the uncorroborated testimony of an undercover agent . . . *A.R.A. Manufacturing*, 83 L.A. 580 (1984) (John Canestraight) . . .; *U.S. Borax & Chemical Corp.*, 84 L.A. 32 (1984) (Frederic Richman) . . .; *General Telephone Company of California*, 73 L.A. 531 (1979) (Frederic Richman) . . .; *General Portland Inc.*, 62 L.A. 709 (1974) (LeRoy Autrey) . . .; *Pettibone Ohio Corp.*, 72 L.A. 1144 (1979) (Marvin Feldman) . . .

Applying the standards enunciated in these decisions to the facts of the present case justifies rejecting "Al" Berry's testimony regarding all Grievants, although Grievants MacDonald, Anderson, Rondeau

and Jensen and even Hudson to some extent admitted an underlying violation of Mill Rule 7. "Al" Berry's reports, upon which the terminations were solely premised, failed to include many important facts, misrepresented several facts, . . . during the course of his investigation.

With respect to Grievant Hudson, "Al" Berry's uncorroborated allegations only implicate Hudson. No mention is made of Berry's drinking of alcohol that day, not only in front of Hudson, but also in front of Ronald Dodge. No mention is made of Berry's efforts to have both of these employees drink alcohol on the job with him and that both refused. Most significant, is that although Berry refers to Grievant Hudson as being intoxicated at around 1:00 p.m. and even more intoxicated at around 3:00 p.m., no facts are put forward upon which he manages to arrive at this conclusion other than that Harry's face was flushed and his eyes were red. At the hearing over two years after the alleged event. Berry attempted to add to these factors and included acting happy and talkative and having slurred speech as evidence of Harry's alleged intoxication. However, he testified that he had no difficulty in understanding Harry and couldn't remember the last time that he even had a drink of vodka prior to December 22, 1983. Being able to "recall" Grievant Hudson's demeanor more than two years prior when he didn't think it significant enough to even place the information in his report, but not remembering when he had his last drink of vodka, so as to allow the Gievant to test his ability to recognize the substance he allegedly tasted with a "sip" is manifestly inconsistent. This memory cannot be turned on and then shut off to suit Mr. Berry's accusations. Most importantly, all the employees who worked with Harry throughout the course of December 22, 1983 and who

had direct conversations with him, including his foreman, refuted Berry's allegations of intoxication. (Union's brief, pp. 29-33)

". . . extremely suspect is "Al" Berry's rational for approaching Hudson for alcohol, specifically, to befriend him to find out about any possible drug use in the area."

Yet, after befriending him, at least on his own terms, he never once made any inquiry of Harry regarding drugs, nor did he ever return to Harry's work site to try to obtain any further information. These facts, coupled with Berry's being observed drinking alcohol on the job and offering alcohol to Ronald Dodge, seriously clouds Berry's credibility . . .

. . . At least three employees testified that they witnessed "Al" Berry either abuse alcohol or marijuana in large quantities and another employee saw "Al" Berry under the influence of either alcohol or marijuana by Berry's own admission. Harry Hudson witnessed Berry taking alcohol from his "Christmas Bottle" on three occasions. By Berry's own admission he had "six sips" during these occasions on the day of December 22, 1983 and had mixed his third drink in an orange juice container. Although "Al" Berry testified that he went upstairs and poured out the drink in the orange juice container, this testimony makes absolutely no sense and is entirely inconsistent with the testimony of Ron Dodge.

Since that was his third drink of alcohol, and since he had already obtained two previous ones from Harry, it makes no sense for him to be pouring the third one out or even obtaining it for other than his own use. Berry testified that the reason he "used" Hudson to get him to give him alcohol was to become friendly with him to find out about drugs in the Mill. Yet, after getting his first drink and chatting with

Hudson, he thereafter went back for at least two more. He never once asked Harry anything about drugs and never returned subsequent to December 22, 1983 to ask him anything about drugs . . .

Ron Dodge gave unrebutted testimony that on the very day that Berry poured himself several drinks in orange juice containers, he was offered a "screwdriver" by Berry, a well recognized term for vodka mixed with orange juice . . . His offer to drink alcohol on Company premises came shortly after Berry had obtained another drink from Harry's "Christmas Bottle" maintained in his locker. Fortunately, Ron Dodge refused, but contrary to Berry's testimony, he observed Berry drinking from the container in which he testified contained alcohol substance.

Further aspects of Ron Dodge's testimony also strongly refute "Al" Berry's account of his drinking activities. Ron Dodge testified that when he reported to work on December 22, 1983 that Berry had failed to do the necessary work to prepare him for his shift work . . . Moreover, all of the entries made by "Al" Berry in the log that day were illegible to Ron Dodge and in Dodge's words appeared to have been made by a child. These facts would clearly indicate that "Al" Berry had indeed consumed several drinks of alcohol on that day and that he was under the influence of alcohol—a scenario that, if revealed, would have impacted his continuing employment with the State Police as well as any potential testimony he might be called upon to give in any of the alleged drug cases that he had uncovered. Thus, Berry's report regarding Harry Hudson served to protect himself.

Berry's mental and medical condition in part caused by his use of alcohol substantiate his drinking

as does his medications . . . Brian Williams' testimony which, like Dodge's, was unrebutted, again confirms Berry's substance abuse problems. His erratric driving of a hand truck and actual crashing of the truck and then asking for more marijuana or alcohol in early February, 1984, is consistent with his practice of drinking on the job. Most significant is the fact that the entire testimony of Brian Williams was contained within the Gwiazda award issued several months before this proceeding began. Thus "Al" Berry was on notice sufficiently in advance of the present proceeding that his actions involved him with alcohol and/or marijuana use on Company property. Despite being on clear notice, neither Berry nor the Company attempted to rebut the Williams testimony that Berry appeared under the influence while crashing up his truck and while asking for further alcohol and/or marijuana.

In contrast to "Al" Berry, Harry Hudson was considered by everyone a model employee, well respected by his supervisors and foreman, who not only never drank on the job, but never hardly drank any alcoholic beverage at all. He worked hard with his crew and his foreman all day on the 22nd and virtually all of them, without any self interest at stake, testified as to his good and safe work, his sobriety, and their lack of any indication that Hudson had consumed any alcohol . . .

Not only is there a reasonable doubt or lack of clear and convincing evidence with respect to Harry Hudson, but Berry's testimony is simply incredible and mixed up. (Union's brief, pp. 33-37)

". . . with respect to Grievant Rondeau, Berry's testimony is incredible as well."

Although Grievant Rondeau admitted to being involved in purchasing marijuana in the parking lot

> on his day off, he did not agree with and took strong issue concerning the other statements which were ascribed to him by "Al" Berry. (Union's brief, p. 37)
>
> * * * *

"The account with respect to Peter Jensen also is seriously flawed and suspect, due to its inaccuracies and omissions."

> Peter Jensen admitted his involvement with Berry and recounted a series of events lasting over two weeks in which Berry tried to use him to bring marijuana onto Mill property . . . noticeably lacking from Berry's report . . . Most significantly, Berry's report fails to state that Jensen indicated that he would purchase the marijuana from Miller Hunt, an employee who Berry at that time already knew to have been involved in drugs on Mill premises and that Berry encouraged this activity, and insisted that the marijuana be brought to him on Mill premises. (Union brief, p. 38)
>
> * * * *

Since Grievants MacDonald and Anderson "admitted smoking marijuana on Mill premises, it is not so much the fact of the underlying event as Berry's embellishment of the report that becomes significant."

> . . . Berry states that these individuals "insisted" that he smoke marijuana with them, but in his own testimony does not refer to his repeated requests for drugs or alcohol as insistence . . . The Company, adopting Berry's actions, did not refer to these innumerable requests made of fellow employees as "insistence". Yet . . . the Company perceives a fellow employee's request of Berry to smoke marijuana on Mill premises as "insistence". Certainly, if Anderson's and MacDonald's requests constitute "insistence", then Berry's repeated requests to fellow employees over two week periods of time, such as

> Peter Jensen, while feigning friendship, likewise become "insistence". When one examines the age and experience differential between "Al" Berry and Peter Jensen, for example, and Jensen's efforts to please Berry as a fellow employee and friend, and Berry's taking advantage of the situation to get Jensen to do something he never did before, and didn't want to do, these factors constitute "insistence". (Union's brief, p. 39)

* * * *

"The discipline of the grievants by termination is inconsistent with past practices and the progressive system of discipline practiced by the Company under Section 7 and therefore is without just and proper cause. Additionally, termination of Grievant Jensen was not for just and proper cause because he was knowingly manipulated and induced into violating the mill rules and collective bargaining agreement by a Company agent."

> . . . it is clear that the Company utilized a progressive system of discipline under Section 7. This system included individual counselling, oral and written reprimands, brief and extended suspensions and finally the EAP and termination itself . . .
>
> Most significant is the unrebutted testimony of William Carver concerning two individuals who the Company believed could have stolen approximately $25,000.00 from the Company. These individuals . . . were given the longest suspension that anyone can recollect at S. D. Warren, six months, before they were allowed to return to their jobs. They also were required to each pay back to the Company $500.00 . . .
>
> . . . Moreover, alcohol related offenses on Mill property had been dealt with in the same manner as other offenses, whether such offenses were under Section 7(b) or 8(a) . . . the Company tolerated

alcohol on Mill premises. Not only had management conducted cocktail parties on Mill property while the production workers were working, but a widely recognized practice had developed over a 30-40 year period whereby employees openly gave bottles of liquor to fellow employees and their foremen and supervisors around the holidays and also gave these bottles of liquor to fellow employees who were having babies, retiring or otherwise celebrating special days in their lives. Additionally, truckers brought bottles of alcohol for the foremen and supervisors in shipping. (Union's brief, pp. 40, 42 & 43)

". . . disciplinary notices in conjunction with the Company's alcohol policy and EAP clearly indicate a policy of employer judgment and discretion with respect to the possession of alcohol in addition to a clear progressive discipline system when that judgment was not utilized properly or the Company believed a Section 7 violation had occurred."

* * * *

"Arbitrators, aside from focusing on the employer's progressive discipline policy, have also analyzed an employer's culpability or inducement of the employee into a rule transgression on the issue of remedy."

Two such cases are *Bathey Manufacturing Company*, 64 L.A. 304 (1975), (Roumell Cosbaren) and *General Tire and Rubber Company*, 69 L.A. 1084 (1977) (Samuel Nicholas), wherein the employer's inducement or provocation resulted in discharges not being upheld, but reduced to twenty and thirty day suspensions. (Union's brief, p. 44)

"See also *Kansas City Power and Light Co.* LA 393 (1985) (Robert Kubie) . . .; *Galis Mfg. Co.*, LA 75 (1966) (Stanton Wood); *ITT Power Systems Corp.*, 84 LA 289 (1985) (Sol Elkins)."

The principles garnished from these cases are directly applicable to the grievance of Peter Jensen.

> Given the position of the Grievant and the particular circumstances surrounding his age and relationship with "Al" Berry, and given the fact that he was only acting *for* "Al" Berry and not for himself, it is clear that S. D. Warren, through "Al" Berry, induced him to violate the agreement . . . No termination is just and proper when incited, induced or provoked by the employer's own actions . . . (Union's brief, p. 47)

". . . a termination is out for just and proper cause when an employer commits a technical violation of a rule . . ."

> . . . alcohol had been maintained in the parking lot . . . with full knowledge of S. D. Warren management and condoned by them. For example, many employees did their grocery shopping before coming to work and left six-packs of beer in their cars . . . Daniel Parks had occasion to drink beer in a camper parked in the parking lot with his foreman, supervisor and two other employees after the 3:00-11:00 p.m. shift had concluded. Charlie Record witnessed a truck driver put bottles of alcohol in one of the foreman's cars during the holiday season in 1984. This car was in the parking lot. (Union's brief, pp. 48 & 49)

"For purposes of progressive discipline each Grievant's case is different."

* * * *

"Arbitrators who have considered the *use* of marijuana on company premises have for the most part equated it with alcohol use.

> . . . they have not found proper cause for termination under factual situations analogous to the present cases. See, e.g., *Mallinckrodt*, 80 LA 1261 (1983) (Marshall Seidman) . . . and *Hooker Chemical Company*, 74 LA 1032 (1980) (Alice Grant)

. . . *General Foods Corp.*, 65 LA 1271 (1975) (Edwards Maslanka). (Union's brief pp. 50 & 51)

* * * *

"There is no just cause for termination of the Grievants MacDonald and Anderson because the Employer did not follow its established practice of offering employees in the discharge mode participation in the Employment Assistance Program as a condition of continued employment."

> At the time of the termination of the five grievants, the Company had in place a program referred to as the Employee Assistance Program. The interrelationship between this program and the Collective Bargaining Agreement under which the grievances were filed was determined in a prior arbitration award involving Russell Greenlaw. Russell Greenlaw was terminated from his employment under Appendix A, Section 7 and 8 of the Agreement and arbitrated the Company's failure to place him in the EAP prior to his termination. Arbitrator Lawrence Katz issued a decision on April 2, 1983 outlining the intent of the EAP, the practices of the parties with respect to how discipline and termination related to it, and its inter-relationship with the Collective Bargaining Agreement. (Jt 6). (Union's brief p. 51)

"The *quid pro quo* for executing such an agreement is that if the employee has continued violations of the Mill rules or policies or of the Collective Bargaining Agreement he or she is discharged without recourse to the Collective Bargaining Agreement grievance-arbitration procedure."

> . . . both Parties benefited from this practice. The employee was more times than not salvaged and once again became a productive employee. The Company received the benefit of the employee's skill and

> experience and was spared the expense of arbitrating discharge cases. Similarly, the Union, together with the Company, could emphasize the seriousness of the situation to these employees and tell him or her that any future violations would be grounds for discharge without recourse to the grievance-arbitration procedure. (Union's brief pp. 52-53)

". . . since the Greenlaw Arbitration decision was issued, the Company has made no changes in its admministration of the EAP and has never notified the Grievants or the Union representatives of any impending changes."

> Grievants MacDonald and Anderson were not offered participation in the EAP prior to their discharge. This was so even though "Al" Berry, based on his experience, believed that these grievants had a "drug problem". Although this term is undefined, it is no less defined than that of "alcohol problem", which problems all the Company personnel believed served as the very basis for the EAP, or "valium problem" which with respect to one individual, the Company thought served as a basis for treatment in the EAP, since it was related to alcohol abuse and sleeping on the job. (Union's brief pp. 53 & 54)

". . . the practice of the Company as well as the Joint Union-Management policy statement (Jt. 20) describing the program's reach and purpose . . . clearly indicates that supervisors who believe employees having problems which are affecting their *attendance, safety, or productivity* should make referral for counselling."

> The results of people who participated in the EAP were highly favorable. Most of the employees continued as productive Mill employees and redeemed themselves, many conquering alcohol abuse. (Union's brief p. 56)

As brought out in Dr. Bishop's testimony—"there is a greater potential for satisfactory results for people

with marijuana abuse problems in treatment in contrast to people with alcohol abuse problems."

> It was his opinion that, statistically, treatment prospects were much more favorable for those employees with marijuana problems because marijuana was not physically or psychologically addicting and there was no painful or physical symptoms associated with withdrawal of the substance. (Union's brief p. 56)

. . . bias in favor of alcohol should have no bearing on the application of the EAP policy."

> When a company has an EAP program, other arbitrators have required the company to offer enrollment when an employee was apprehended utilizing alcohol and/or marijuana at the work place. See, *Chicago Transit Authority*, 80 LA 664 (1983) (Peter Meyers) . . .; *Hooker Chemical Co.*, 74 LA 1032 (1980) (Alice Grant) . . .; *Armstrong Pulsker Company*, 77 LA 775 (1981) (Adolph Koven) . . . (Union's brief p. 57)

". . . the hard-drug user, who is performing his work in an unsatisfactory manner and who is an obvious danger to himself and others, is required to receive offers of help . . ."

> . . . MacDonald and Anderson got fired for their use of marijuana without any offer of assistance when no evidence was presented that their work was unsatisfactory . . . given the Company's commitment to the Grievants to utilize the EAP, their termination . . . without providing them this opportunity is not for proper cause. (Union's brief pp. 58 & 59)

* * * *

"The Company relied totally on the reports of an undercover agent . . . for terminating the Grievants."

> No investigation of any of the underlying facts surrounding any of the Grievants was ever undertaken. No inquiry was ever made into the Grievants' prior work records, nor were discussions conducted with their foremen and/or supervisors regarding their work performances. Instead, all gievants were summarily terminated without any opportunity to state their version of the events. (Union's brief p. 59)

"In this society one's work is their persona."

> A discharge is akin to capital punishment. Our society cannot tolerate the setting up of employees in the work place by playing on their vulnerabilities as justification for work place death sentences, nor can it tolerate unremitting reliance on self interested undercover agents, while ignoring the history which exists under an agreement with its employees for the treatment of certain conduct and rule violations. (Union's brief pp. 60 & 61)

"For the foregoing reasons, the Grievants respectfully request this Arbitrator to hold that their discharges were not just and proper under the terms of the Collective Bargaining Agreement and that they be reinstated with full back pay and benefits as of their terminations on February 15, 1984."

Discussion

During the course of the hearings the Parties submitted/introduced via testimony and exhibits evidence which postdated the discharges that gave rise to the instant Issue. Occasionally, one of the Parties objected to the inclusion. Whereas arbitrators generally do not accept any post incident evidence, especially when there is an objection, since five (5) *discharges* were involved this Arbitrator permitted submission/introduction of post February 16, 1984 evidence over objections when the

submitting Party indicated it believed the evidence to be relevant.

After review and study of the voluminous record in this case the Arbitrator found only Joint Exhibit No. 2, Arbitrator Gwiazda's Award and Union Exhibit No. 124 (Company Exhibit No. 59), the December 7, 1984 deposition of Maynard N. Jensen sufficiently relevant to warrant consideration and substantive weight. Little or no weight was accorded Joint Exhibits 3, 4, 5, 29, 30, 31; Union Exhibits 1, 3, 27, 28, 29, 30, 31, 32, 33, 34, 40, 60, 70, 93, 94, 95, 98, 101, 103, 113, 120, 121(a), 121(c), 123, 125, 172, 186, 205, 207, 208, 209, 210; and Company Exhibits 14, 15, 44A, 44, 45, 48, 57.

* * * *

The Arbitrator finds the pertinent language of the Parties' Agreement controlling of the instant issue to be within Article 4—Management Rights (see page 4) as follows:

> This right includes . . . and except as expressly modified by specific provision of this Agreement, the right to . . . discharge employees for proper cause. . . .

The specific provision which expressly modifies the Company's right to discharge employees for proper cause are found in Appendix A, Sections 7, and 8, (see pages 4 & 5). This Arbitrator concurs, however, as found by Arbitrator Gwiazda, that this modifying language is neither clear nor unambiguous. As she succinctly indicated (Exh. J-2, p. 19):

> "First, is the meaning of the contract plain? I cannot find that it is. Granted Section 7 of the Mill Rules is titled "Causes for Discharge," but there is no verb used. It does not say whether such causes "*will be*" or "*may* be" grounds for termination. The title is then followed by two separate sentences (JX 1, emphasis added):

> "Violation of prescribed rules are cause for disciplinary action *of varying degrees of severity.*
>
> Violations of the following rules *are* considered causes for discharge."

These two sentences heighten, rather than clarify, the ambiguity of the title. *Will* violation of Section 7 rules invariably be penalized with discharge or not? It is not clear.

Nor do I find the Company's position supported by reading Mill Rule 7 in conjunction with Mill Rule 8 or with Company Safety Policy. Mill Rule 8 simply adds that certain other violations are "Causes for Discharge After Appropriate Warning." Again, no verb is used in the title; we still do not know whether the Parties agreed such violations "will be" or "may be" causes for discharge . . . We only know that those employees are guaranteed at least one warning before they are terminated . . .

Absent clear, unambiguous, express modifying language, the Arbitrator finds the Company's right to discharge in the instant case is limited to—"for proper cause".

The Arbitrator concurs, as noted by the Company, that arbitrators generally consider synonomous the language "proper cause", "just cause", or "cause". In addition, they require the employer bear the burden of proving by clear and convincing proof if not proof beyond a reasonable doubt that proper cause/just cause/cause for discharge did indeed exist.

As observed by the Company, the Arbitrator in *Martin-Brower Co.*, 78 LA 236, 238 (Role, 1982) indicated he subscribed as do most, if not all arbitrators, to the "just cause" test or its equivalent as delineated

by Arbitrator Carroll R. Daugherty in *Grief Bros. Cooperage Corp.*, 42 LA 555 (April 16, 1984) as follows:

> Whether just cause for discharge exists may be determined by answers to the following questions. "No" answer to one or more normally signifies that just and proper cause did not exist.
>
> (1) Did employer forewarn employee of possible consequences of conduct?
>
> (2) Was rule or order involved reasonably related to the orderly, efficient, and safe operation of business?
>
> (3) Before administering discipline, did employer make effort to discover whether employee did, in fact, violate or disobey rule or order?
>
> (4) Was employer's investigation conducted fairly and objectively?
>
> (5) In investigation, did employer obtain sufficient evidence or proof that employee was guilty as charged?
>
> (6) Has employer applied its rules, orders, and penalties evenhandedly and without discrimination?
>
> (7) Was degree of discipline reasonably related to seriousness of the offense and the employee's record?

In addition, absent express contractual language *mandating* discharge for egregious conduct or clear agreement/understanding by the parties, consistently effected, that a specific offense warranted discharge upon a first occurrence, arbitrators generally require evidence the employee is incorrigible. Progressive/corrective discipline or counseling to effect a positive behavior modification would not, in all probability, be successful.

Testimonies of the Parties' witnesses, the 158 exhibits of Employee Warning Notices and the 17 exhibits with

reference to E.A.P. cases lead the Arbitrator to believe that were he privy to the details surrounding the eleven (11) terminations (Exh. U-4) made during the three years prior to the instant February 15, 1984 discharges and submit this evidence to the foregoing "just cause" criteria standards, he is confident he would find they all would meet/satisfy the tests.

* * * *

The Arbitrator is not persuaded, as submitted by the Company, that it properly/sufficiently—"forewarned employees of the not just possible, but likely serious consequences of their conduct." Whereas he acknowledges the Grievants all admitted they *knew* that possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs were dischargeable offenses, he does not believe they clearly understood they *would be discharged upon a first discovered violation.*

The Arbitrator does not find the Company's notice of October 10, 1981 (Exh. C-8, see page 13), October 4, 1983 (Exh. C-9, see page 13, and December 16, 1983 (Exh. C-10, see page 14) or the Union's communication of October 1983 (Exh. C-11, see page 14) contain the clear, explicit, unambiguous language to constitute the appropriate "forewarning" that *discharge would result from a first Section 7(a) offense.*

A few years ago the Arbitrator upheld the discharge of two men for "dishonesty". The company, a food processor and retailer, clearly and convincingly proved employees were *advised when hired* that removal of any food or store items without an appropriate sales slip was *cause for immediate suspension pending discharge for* dishonesty". Notices *reminding* employees of the rule were posted in areas frequented by them. In addition, *whenever* an *employee* was found to have *committed* this *"dishonest" act discharge was consistently imposed* notwithstanding the employee had a good or an

excellent employment record or that the product taken was of the dollar value. The Company submitted evidence of other arbitrators' decisions all upholding the company's discharges for a first "dishonesty" defense justified by the clear, explicit understanding with its employees and its consistent practice of effecting discharges when the "dishonesty" rule was violated. A particularly striking case was an arbitrator's upholding the discharge of an eighteen (18) years service female employee with an impeccable personnel record for marketing a 39 cent (at that time) Chapstick. When confronted with the evidence the employee claimed she had intended to pay for it but it had slipped her mind. She offered to pay . . . but it was too late. The arbitrator (female) found the employee's testimony credible but determined she was without authority to substitute her own brand of industrial justice for the employer's *consistent practice.*

Nor does the Arbitrator find the instant Grievants could have been forwarned by a consistent Company practice to discharge for a first Section 7(a) offense. The Company noted the Grievants were three of twelve employees, the *first* ever to be discharged for violations of Section 7(a). In addition the Union submitted 90 exhibits, Warning Notices issued by the Company for Section 7(a) through (n) offenses between July 1970 and February 16, 1984 when the Grievants were discharged. *Not one (1)* of the ninety (90) Verbal Warnings/Written Warnings/Suspensions *was for a Section 7(a) violation.*

In *McGraw-Edison*, 81 LA 403 (Role, 1983) this Arbitrator upheld the discharge of an employee for absenteeism and tardiness when he had shown the employee knew or certainly should have known he would be discharged the next time he was absent without a reason acceptable to the company. The Arbitrator was persuaded by the evidence that section (405):

F— was first counseled re excessive absenteeism and tardiness on April 1, 1981. He received 2nd Level counseling in September 1981 and 3rd Level counseling on January 20, 1982. At each level F— indicated he understood and that the problem would be resolved. January 21, 1982 was his paid decision making leave day. He was clearly advised, and understood that this was "the end of the line, that there was no further counseling sessions . . ." and if the problem persisted the Company had no choice but to terminate him. Nevertheless, shortly thereafter he arranged a trip to Florida which ended up returning him to Boston a day late. He could have returned on time via New York.

The Arbitrator was truly impressed with the unusual background, caliber and knowledge of Mr. Peter B. Bensinger, the expert witness called by the Company. His testimony and Special Report—"Drugs in the Workplace" published in the November-December 1982 issue of the Harvard Business Review (Exh. C-33) were both enlightening and instructive. On page 2 of this paper is the following:

Establish and communicate a clear policy on drug use.

A company must do more than merely state that it does not condone drug use, and that an employee possessing or taking an illegal drug may be dismissed, disciplined, or turned over to law enforcement authorities. Management should see that employees understand the health and safety risks caused by drugs and the danger posed in the workplace by drug abuse. It has to explain that it is determined to obey the law, and that in so doing it may take internal disciplinary action as well as call on law enforcement agencies. *It needs to spell out the company drug policy clearly and specifically*

> *so that employees know exactly where they stand.* (Arbitrator's Emphasis)

and on page 4:

> Many companies, such as Virginia Electric & Power Company, require that *all new employees sign a statement to the effect that they understand the company's policy on drugs and accept it as a condition of employment.* If a company articulates its policy, enforces it, and has good relationships with both employees and local security and law enforcement agencies, it makes clear that it is dealing with a serious problem in a competent, professional way. Thus the company and its employees are less likely to be faced with a sudden, embarrassing surprise. (Arbitrator's Emphasis)

Clear, unambiguous communication is the foundation and consistently applied discipline policies and practices are the core of all the foregoing examples. Characteristics the Arbitrator finds somewhat lacking in the events which led to the instant five (5) discharges. The Company's *concededly "good faith" efforts and intentions* notwithstanding.

The key factor in the Arbitrator's conclusion re just cause criterion question No. 1 is whether or not the Company clearly and convincingly showed the Grievants knew or should have known they were in a discharge mode vis a vis Section 7(a) offenses. He finds the Company did not meet its appropriate burden of proof in this respect. If Management intended to summarily discharge all employees discovered violating any provision of Section 7(a) at the time Agent Berry began his investigation *it was incumbent upon it to clearly and unambiguously so advise the Employees. And,* in addition, *ascertain each and every Employee understood and knew exactly where s/he stood* regarding Section 7(a) infractions. That it *would result in a summary dismissal the first time the Employee was caught.*

Nor was there any evidence of a consistent, known/observable past practice of discharging upon first occasion egregious Mill Rule 7 a-n offenses that might serve as "forewarning" to Employees. On the contrary the record is replete with instances of appropriate Company patience and understanding vis a vis Mill Rule 7 offenders especially when alcohol abuse was at the source of the problem.

In view of all the foregoing the Arbitrator concludes the *Grievants were not properly forewarned they were subject to discharge upon a first Section 7(a) offense.* Accordingly, he assigns a "No answer to criterion *question No. 1.*

* * * *

As submitted by the Company and forcefully demonstrated in Company Exhibit No. 42, an estimated potential annual minimum loss for the S. D. Warren Co. of $3,136,534 due to employee substance abuse warrants an unwavering *"YES"* answer to just cause *criterion question No. 2*—"was the rule or order involved reasonably related to the orderly, efficient and safe operation of the business?"

* * * *

The Arbitrator acknowledges, as submitted by the Company, that it went to substantial lengths to discover the Grievants had violated Section 7(a). However, implicit in criterion question No. 3 is that unless the offense is so egregious as to warrant summary arrest or the employee's continued presence constitutes a danger/threat to the employer's property, to other employees, or to the offending employee herself/himself, the employee must be given a chance to respond to the charge(s) against her/him. A "due process" opportunity to explain her/his side of the story. A democratic right to hear and respond to accusations made against her/him.

The Arbitrator is persuaded by the evidence that, as repeatedly noted by the Union, the Grievants *were sum-*

marily discharged on February 15, 1984 effective February 16, 1984. He finds, therefore, "*No*" is the appropriate answer to *criterion question No. 3*:

> Before administering discipline did employer make effort to discover whether employee did, in fact, violate or disobey rule or order?

* * * *

The Arbitrator concurs, as submitted by the Company, that the investigation conducted through the Maine State Policy by Mr. Berry was fair, objective, thorough and professional. He is persuaded by the expert testimony of Mr. Peter Bensinger that the use, as here, of a professional agent to uncover violations of controlled substance laws in the Mill was entirely appropriate and probably the only way it could have been accomplished. Accordingly the Arbitrator is persuaded to assign a "*Yes*" answer to criterion question *No. 4*. (See page 40).

* * * *

The evidence persuades the Arbitrator that the Company, via Agent Berry, clearly obtained sufficient evidence that the Grievants were guilty of Section 7(a) violations. However, the *record* does not convince the Arbitrator Mr. Harry Hudson either drank any of his Christmas gift vodka at the Mill on December 22, 1983 or was—"intoxicated" as—"appeared" . . . "somewhat" and—"seemed even more" to Agent Berry that day (Exh. C-7). The Arbitrator finds the credible testimonies of Union witnesses Brian Williams and Ronald Dodge and Foreman Maynard M. Jensen (Deposition, Exh. U-124, C-59) and other evidence cast a cloud of doubt over the credibility of Agent Berry's testimony and evidence whenever and wherever *alcohol* is involved. He nonetheless, as claimed by the Company, answers criterion question *No. 5* (see page 40) in the *affirmative.*

* * * *

The evidence does not support the Company's claim that in penalizing the Grievants with discharge it acted even-handedly and without discrimination.

As noted above there had been no Employee Warning Notices written to any Employee for a 7(a) violation. Neither verbal, written, suspension or discharge. Since 7(a) is one (1) of fourteen (14) Section 7 rules (a through n)—"considered causes for discharge" (see pages 4 & 5) and there was no claim made nor evidence presented to indicate that violation of any one of the fourteen "causes" was considered by the Parties to be either more or less egregious than the others, an analysis of a number of the Company's disciplinary penalties prior to February 15, 1984 for violations of Section 7(a) equivalents (7 b-n) should, in the Arbitrator's opinion, result in an indication of the Company's judgment and decision policy relative to appropriate penalties for infractions of these rules. Discretionary decisions which the Arbitrator concurs are, as claimed by the Company, clearly its right to make.

Analysis—Section 7 Employee Warning Notices, 3/15/70-2/16/84 (partial)

Mill Rule	Earliest Date	Discipline	Total Warnings	Total Suspensions	Total Days Suspended	Total Notices
7a)	—	—	—	—	—	—
7b)	(7/20/81)	1-verbal; 1-written	2	—	—	2
7c)		1-discharge; (Exh. C-58) 1974	—	—	—	—
7d)	—	—	—	—	—	—
7e)	(4/27/71)	4-verbal; 6-written; 3-1 day; 3-3 day	10	6	12	16
7f)	(1/27/71)	6-written; 1-2 day; 2-3 day; 1-3 wk. & EAP; 1-60 day & EAP; 3 discharge (EAP failed)	6	5	89	11
7g)	(11/11/73)	1-verbal; 3-written; 5-5 day; 2-7 day	4	7	39	11
7h)	(8/17/70)	1-3 day; 3-2 wk.; 1-3 wk.; 1-6 mos.	—	6	249	6
7i)	(7/25/70)	5-written; 1-1 day; 1-1½ day; 1-3 day	5	3	6	8
7j)	—	—	—	—	—	—
7k)	(3/15/70)	3-verbal; 12-written; 2-1 day; 10-2 day; 1-3 day; 1-4 day	15	14	14	29

7l)	(9/16/73)	2-written; 1-1 day; 1-3 day	2	2	4	4
7m)	(2/20/83)	2-written; 1-2 wk.	2	1	14	3
7n)	—	—	—	—	—	—
	Totals		46	44	427	90

warnings = 51% of total
suspensions = 49% of total
average suspension = 9.7 days
longest suspension = 6 months

Analysis—Section 8 Employee Warning Notices, 11/28/68 - 2/16/84 (partial)

Mill Rule	Earliest Date	Discipline	Total Warnings	Total Suspensions	Total Days Suspended	Total Notices
8a)	(11/28/68)	6-written (4-EAP mand.) 4-1 day; 3-2 day; 6-3 day; 3-7 day; 2-2 wk.	6	18	77	24
8b)	—	—	—	—	—	—
8c)	(7/21/70)	12-written; 4-1 day; 2-2 day; 4-3 day; 1-6 day; 1-7 day; 1-10 day	12	13	43	25
8d)	—	—	—	—	—	—
8e)	—	—	—	—	—	—
8f)	—	—	—	—	—	—
8g)	(1/9/80)	2-written	2	—	—	2
	Totals		20	31	120	51

warnings = 39% of total
suspensions = 61% of total
average suspension = 4 days
longest suspension = 2 weeks

In view of the above analysis of Section 7 (b-n) Mill rules violations, rules the Agreement lists as—"Causes for Discharge" as in Mill Rule 7(a), wherein the longest suspension was for 6 months and the average 9.7 days, the Arbitrator finds the instant discharges for first offenses of Mill rule 7(a) discriminatorily severe disciplines. In addition, the only discharge upon a first occasion Section 7 offense submitted the Arbitrator occurred in October 1974 (Exh. C-58) many years prior to the hiring of the instant grievants. They could not, therefore, have known the Company *ever* summarily discharged upon a first offense.

In view of the foregoing the Arbitrator finds criterion question *No. 6*:

> Has employer applied its rules, orders, and penalties evenhandedly and without discrimination?

warrants a "*No*" answer in the instant five (5) discharges.

* * * *

The evidence persuades the Arbitrator that whereas eventual termination could be justified for serious Mill Rule 7(a) offenses as committed by the Grievants the record will not support a conclusion that discharges were appropriate in the instant cases. No evidence was presented the Arbitrator to show any prior disciplinary reprimand or suspension had been issued any of the Grievants for any Mill Rules 7 or 8 offense. Absent prior disciplines placing them in a discharge mode the Arbitrator finds, as determined above, discharges were discriminatorily severe punishment for their offenses. "*No*" answers are, therefore, the proper responses to criterion question *No. 7*:

> Was degree of discipline reasonably related to seriousness of the offense *and the employee's record*?

* * * *

Having found "No" responses appropriate for four (4) of the seven (7) "just cause" criteria questions the Arbitrator concludes the Company lacked proper cause/ just cause to discharge David R. Rondeau, Harry R. Hudson, Gary W. Anderson, Michael W. MacDonald, and Peter W. Jensen, Jr. In so doing it violated Article IV (see page 4) of the Collective Bargaining Agreement between the Parties.

Remedies

The Grievants shall be reinstated with all seniority and benefits rights restored.

Whereas the Arbitrator has determined proper cause/ just cause did not exist for the Grievants' discharges he finds their admitted Mill rule violations do warrant disciplines. He is persuaded by the evidence that the disciplinary actions should vary both in severity and substance. From a minimum of a written warning to a maximum of six (6) months suspension and possible EAP participation, *consistent with the Company's past discipline practices* as exemplified by the Analysis of Section 7 Employee Warning Notices (3/15/70-2/16/84) on pages 46 & 47.

The Arbitrator is of the opinion, based upon the voluminous record generated during the six and one half (6½) very full days of hearings, that the Parties' relationship, labor relations expertise, understanding of the evidence, and knowledge of the Grievants' individual preformance, conduct, problems both on and off the job etc. put them (Parties) in the best position to determine the appropriate discipline penalties and "make-whole" remedies. Accordingly he remands these determinations to conference and negotiations by them. In addition he retains jurisdiction until September 1, 1986 in the event his assistance is required to finalize these remedies decisions. Jurisdiction will be extended upon the request of either Party.

Addendum

The Arbitrator appreciates that—"this is perhaps the single most important case this Company has ever faced". He concurs, as submitted by the Company, that the issue of drugs in the workplace is very important. And one that definitely should not be minimized. He does not, however, share the Company's concern that the Arbitrator's reinstatement of the Grievants will adversely affect the Company's policy with reference to—"possession, use or sale on Mill property of intoxicants, marijuana, narcotics or other drugs".

The following excerpt from "Drugs in the Workplace" by Company expert witness Peter B. Bensinger is worth repeating (Exh. C-33, p. 4):

> . . . *If a company articulates its policy, enforces it, and has good relationships with both employees and local security and law enforcement agencies, it makes clear that it is dealing with a serious problem in a competent, professional way* . . . (Arbitrator's Emphasis)

and as Mr. Bensinger wrote on page 5 (Exh. C-33):

> Management and unions should focus on the drug problem in their negotiations to ensure that company drug policy and workplace rules are not arbitrarily drawn up but reflect the common interests of the company and employees . . .
>
> Companies should offer help to those employees with drug problems who are willing to seek assistance. This is not only good employee relations, it is also good for business-retraining, hiring, and arbitration costs are avoided and it helps the company's image . . .

The Arbitrator's decision does not prevent the Parties, in their mutual economic and social self interests, from removing Mill Rule 7(a) from Section 7, establishing it

as a separate rule unto itself with clear, unambiguous, explicit language delineating the degree of punishment Employees can expect upon a *first offense of possession* on Mill property of (a) intoxicants, (b) marijuana, (c) narcotics or other drugs; upon a *first offense of use* on Mill property of (a) intoxicants, (b) marijuana, (c) narcotics or other drugs; upon a *first offense of sale* on Mill property of (a) intoxicants, (b) marijuana, (c) narcotics or other drugs.

* * * *

The Company cited twenty-five (25) cases; the Union cited twenty-three (23). Arbitrators are not necessarily bound by precedent or decisions of other arbitrators or courts because of the differences in contract language and conditions surrounding an issue.

The Arbitrator, in his study of the cited cases found neither statement, opinion, or decision of the arbitrators and courts cited which would significantly alter his foregoing conclusions/decisions. Indeed, the conditions although similar for four (4) of the five (5) instant Grievants and the grievants in Arbitrator Gwiazda's case, in that the incidents involved marijuana, were nevertheless sufficiently different to warrant varying the disciplinary penalties, make whole remedies and possible restrictions (EAP) under which each of the Grievants will work in the future.

* * * *

Any evidence, submission, assertion or claim etc. not specifically addressed by the Arbitrator was concurred with or determined to be irrelevant or of insufficient weight to significantly affect his conclusion and/or findings.

/s/ Theodore Role
THEODORE ROLE
Arbitrator

Milton, Massachusetts
June 24, 1986

SUPREME COURT OF THE UNITED STATES

No. A-980

UNITED PAPERWORKERS' INTERNATIONAL UNION, AFL-CIO, LOCAL 1069,

Applicant,

v.

S.D. WARREN COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 18, 1988.

/s/ W.J. Brennan, Jr.
Associate Justice of the
Supreme Court of the
United States

Dated this 25th day of June, 1988.

(3)

Supreme Court, U.S.
FILED
NOV 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-462

In The

Supreme Court of the United States

October Term, 1988

United Paperworkers International Union,
AFL-CIO, Local No. 1069,

Petitioner,

v.

S.D. Warren Company, A Division of
Scott Paper Company,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

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November 16, 1988

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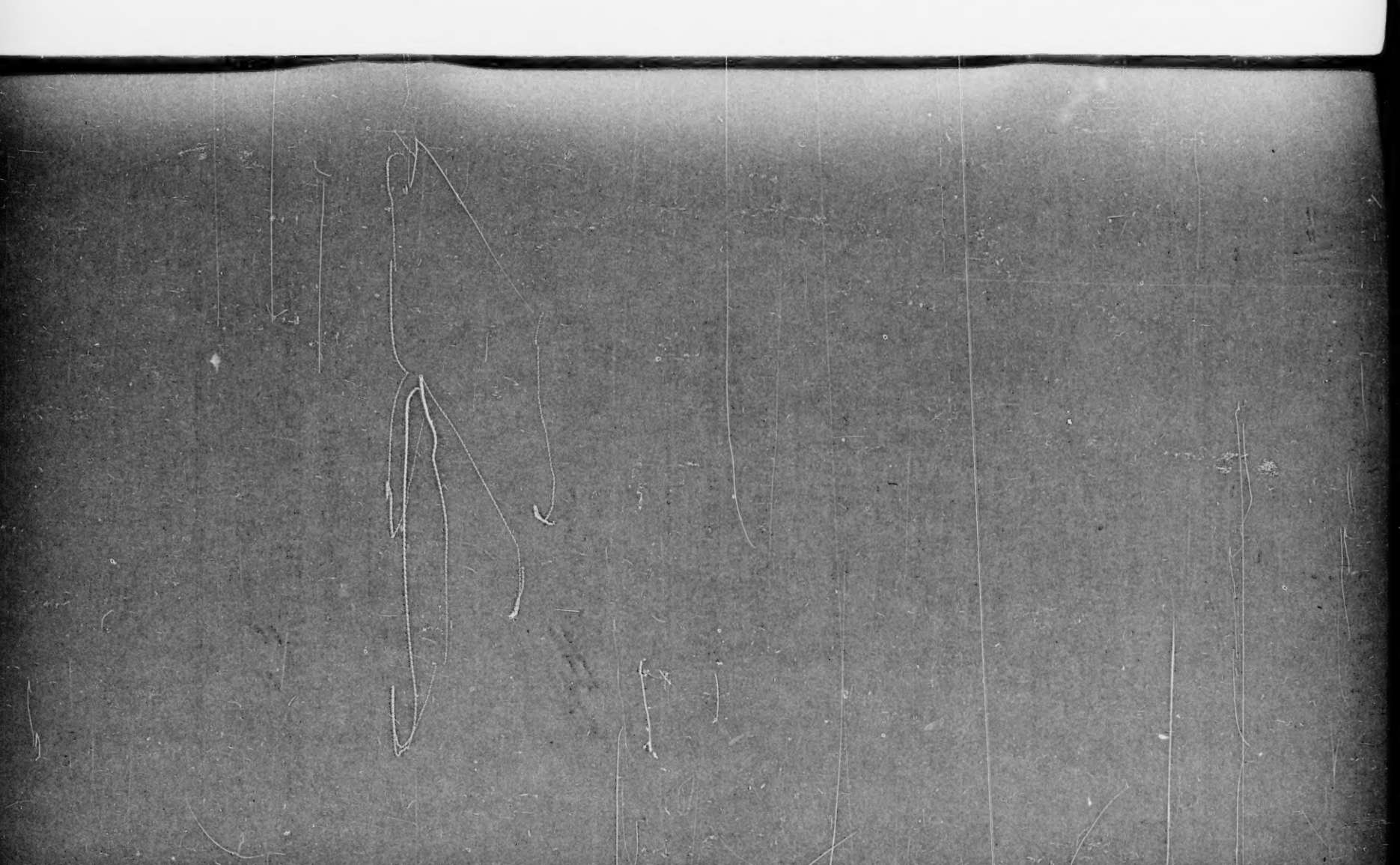

QUESTION PRESENTED

Whether the scope of arbitral authority is unrestricted by the express language of a collective bargaining agreement reserving to management the "sole right . . . to discharge employees for proper cause," and providing that violation of a workplace drug and alcohol rule is "cause for discharge," where an arbitrator finds that employees subject to discipline in fact violated the workplace drug and alcohol rule?

RULE 28.1 LISTING

Scott Paper Company has the following subsidiaries and affiliates (except wholly-owned subsidiaries): Scott Iberica, S.A.; Taiwan Scott Paper Corporation; Cellulosa Jujuy, S.A.; Compania Industrial de San Cristobal, S.A.; COPA-Companhia de Papeis; Sanyo Scott Company Limited; Scott Paper Company de Costa Rica, S.A.; Scott Paper Limited: Scott Trading Limited; Ssangyong Paper Company, Limited; Thai-Scott Paper Company; Cabin Bluff Management Company (partnership); Canso Chemicals Limited; Mountain Tree Farm Company.

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No. 88-462

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United Paperworkers International Union,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION

JURISDICTION

Respondent's request of September 28, 1988, for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari was granted by the Clerk of this Court, and time was extended up to and including November 18, 1988. Resp. App. A, p. 1a.

STATEMENT OF THE CASE

Petitioner United Paperworkers International Union, Local 1069, representing employees at S.D. Warren's Cumberland Mills, negotiated and entered into a collective bargaining agreement with Respondent S.D. Warren Company. The bargaining agreement reserves to the Company "the sole right to . . . discharge employees for proper cause." In Mill Rule 7(a), the bargaining agreement in turn provides that possession, use or sale of illegal drugs or intoxicants is "considered cause for discharge." Pet. App. F, p. 109a. *See also* Pet. App. H, pp. 133a-135a.

After an undercover investigation, twelve employees at the Company's Cumberland Mills were discharged for violation of the workplace drug and alcohol rule, eleven for dealing in illegal drugs, and one for possessing alcohol on Company property. The Union presented grievances on behalf of ten of the twelve, dividing the discharged employees into two groups of five.*

Arbitrator Suzanne Gwiazda found that the four discharged employees in the first group had violated the workplace drug and alcohol rule. Pet. App. E, pp. 94a-107a. She also found that, under the collective bargaining agreement, the Company "chose to retain discretion over . . . decisions" regarding discipline of employees who had violated the rule. Pet. App. E, p. 77a. Arbitrator Gwiazda concluded, however, that when the Company bargained for the sole right to decide discipline for violations of the workplace drug and alcohol

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*The Union voluntarily withdrew the grievance for one of the individuals in the first group.

rule, "it allowed a third party neutral the same discretion when reviewing the propriety of those decisions." *Id.*

To determine her award, Arbitrator Gwiazda weighed various "mitigating circumstances."* The Arbitrator's independent evaluation told her that although the grievants' "drug activity in the workplace must be viewed as very serious misconduct," Pet. App. E, p. 93a, the better decision was for the Company to suspend, not discharge. *See* Pet. App. E, pp. 97a, 99a, 103a, 107a.

Rejecting the recommendation of its magistrate, the United States District Court for the District of Maine upheld Arbitrator Gwiazda's award reinstating the discharged employees. Pet. App. D, pp. 39a-40a. In *S.D. Warren* I, the United States Court of Appeals for the First Circuit reversed, holding that the parties had not bargained for arbitral review of the disciplinary decision, but instead had restricted the scope of the Arbitrator's authority by creating in the Company an exclusive right to decide discipline for violations of the workplace drug and alcohol rule. Pet. App. C, pp. 26a-27a. The First Circuit also said that the Arbitrator's award violated a dominant and well-defined public policy against drugs in the workplace. Pet. App. C, p. 30a.

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*For example, in determining the "fair" penalty for one employee, the Arbitrator assessed her seniority, work record, working conditions, initial resistence to the undercover agent, and her possession of marijuana for use after work. Pet. App. E, pp. 102a-103a. "[B]alancing the seriousness of drug possession in the mill against the many mitigating factors," Arbitrator Gwiazda "conclude[d] that the fair penalty is a four-month suspension." Pet. App. E, p. 103a.

The Union petitioned this Court for a writ of certiorari. While the petition was pending, this Court decided *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987). In light of *Misco*, the Union's petition was granted, the First Circuit judgment was vacated, and the case was remanded to the court of appeals for further consideration under *Misco*. Pet. App. B, p. 12a.

In *S.D. Warren* II, the First Circuit assumed, without deciding, that *Misco* foreclosed the public policy grounds upon which the court had earlier relied. Following rebriefing and argument, the First Circuit reaffirmed its ruling that Arbitrator Gwiazda had "exceeded her contractual authority in overturning the employees' discharges." Pet. App. A, p. 8a. After a lengthy and detailed discussion of the facts and holding in *Misco*, the court of appeals distinguished *S.D. Warren*. Pet. App. A, pp. 2a-11a. First, in *S.D. Warren* there was no attempt to set aside or undermine an arbitrator's findings. Pet. App. A, p. 9a. The First Circuit explained that the Arbitrator below found " 'beyond a reasonable doubt' " that the discharged employees violated the workplace drug and alcohol rule. Pet. App. A, p. 9a. In this respect, *S.D. Warren* was unlike *Misco*, where "the arbitrator found that the Company failed to prove that the employee had possessed or used marijuana on company property." *Misco*, 108 S. Ct. at 368-69. Second, the First Circuit recognized that in *S.D. Warren*, unlike *Misco*, the parties had negotiated, incorporated into the collective bargaining agreement, and put before the arbitrator a specification of

disciplinary rules and resulting penalties which left nothing to the arbitrator except to determine whether a violation occurred. Pet. App. A, p. 10a. The court of appeals concluded that *S.D. Warren* came under the exception envisioned in *Misco* when this Court explained that "[t]he parties, of course, may limit the discretion of the arbitrator . . . and it may be [that] it was within the unreviewable discretion of management to discharge an employee once a violation of [the] Rule was found." *Misco*, 108 S. Ct. at 372. This exception applied in *S.D. Warren* and not in *Misco*, because in *S.D. Warren* the Arbitrator found that the employees violated the disciplinary rule, and the collective bargaining agreement reserved to management exclusive authority over discipline of employees who violated the disciplinary rule. Pet. App. A, pp. 10a-11a.

Meanwhile, the second group of grievants came before Arbitrator Theodore Role, who entered his award after the district court upheld the Gwiazda reinstatements, but before the court of appeals reversed in *S.D. Warren* I. Arbitrator Role observed that under the collective bargaining agreement "the Company's right to discharge in the instant case is limited to – 'for proper cause.' " Pet. App. H, p. 185a. Next, the Arbitrator observed that the "proper cause" necessary to the Company's right to discharge was synonymous with the "cause" for discharge resulting from an employee's violation of the workplace drug and alcohol rule. *Id.* Finally, the Arbitrator observed that the Company "clearly obtained sufficient evidence that the Grievants were guilty of Section 7(a) violations." Pet. App. H, p. 192a. But, in the face of these observations, Arbitrator Role added a seven-part test which allowed him to reject

discharge in favor of suspension.* Pet. App. H, pp. 186a-198a.

After Arbitrator Role entered his award, the First Circuit decided *S.D. Warren* I and then, on remand in light of *Misco*, reaffirmed its earlier decision to vacate the Gwiazda reinstatements in *S.D. Warren* II. The United States District Court for the District of Maine followed the First Circuit's decision in *S.D. Warren* II, and vacated the Role reinstatements. Pet. App. G, pp. 124a-126a. The Union appealed, and in *S.D. Warren* III, the First Circuit affirmed.

For the third time, yet another panel of the court of appeals explained that the language of the particular collective bargaining agreement before it restricted the scope of arbitral authority by reserving to the Company the exclusive discretion to discharge for violation of the workplace drug and alcohol rule. Given that the Arbitrator found that the discharged employees violated the workplace drug and alcohol rule, and given "the difficulty one has imagining how one could use the English language to state more clearly that the Company retains

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*For example, one of the factors in Arbitrator Role's seven-part test was whether the "degree of discipline [was] reasonably related to [the] seriousness of the offense and the employee's record." Pet. App. H, p. 186a. The Arbitrator concluded that discharge of the employees for violating the workplace drug and alcohol rule was too severe. This conclusion was based upon an elaborate charting of the relative penalties for violations of various rules other than the workplace drug and alcohol rule, which revealed that the longest suspension for such other types of violations was six months and the average suspension was 9.7 days. Pet. App. H, pp. 194a-197a.

the prerogative to decide whether or not to discharge one who violates Mill Rule 7," the First Circuit again concluded that *Misco* was distinguishable, and that the court must vacate "an arbitrator's interpretation of a contract outside the authority delegated to him by the contract." Pet. App. F, p. 111a.

REASONS FOR DENYING WRIT

In 1987, this Court decided the case of *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987). Following on the heels of *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), *Misco* gives new emphasis to principles this Court announced twenty-five years ago in the *Steelworkers Trilogy*. *See United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).[1]

Petitioner concedes that *Misco* speaks directly to the question of a federal court's authority to review arbitral

[1] In the words of one commentator, *Misco* "breathed new life" into precepts of the *Steelworkers Trilogy*. Note, *The Public Policy Exception to Judicial Deferral of Labor Arbitration Awards – How Far Should Expansion Go?*, 39 S.C.L. Rev. 465, 489 (1988). The relative paucity of scholarly commentary regarding the impact of *Misco* is doubtless due to the fact that insufficient time has elapsed for commentators to react in print.

interpretations of collective bargaining agreements.[2] Indeed, Petitioner forcefully argues that "[a]ny doubt as to the meaning of the *Trilogy* with respect to the scope of judicial authority to enforce a court's understanding of the 'express language' of a collective bargaining agreement should have been laid to rest . . . by this Court's decision in *Misco*." Brief for Petitioner at 20. Respondent agrees.

The issue, therefore, is not whether any of the circuit courts, prior to *AT&T* and *Misco*, differed in their application of *Steelworkers* principles.[3] Rather, the issue is whether, after *AT&T* and *Misco*, any split has developed which justifies a third restatement of the relevant law in as many years. For three reasons, this Court should refrain from yet another foray into the area.

A. Such an effort would be premature. Review of Petitioner's Table of Authorities underscores the prematurity of certiorari. Only one circuit case is cited which was decided after *Misco*, and it lacks a published opinion.

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[2] Although a writ of certiorari was granted in *Misco* "on the question of when courts may set aside arbitration awards as contravening public policy," the parties argued, and this Court decided, the issue of whether the court of appeals had exceeded its authority to review the arbitrator's award. *Misco*, 108 S. Ct. at 369-73.

[3] Respondent here reaffirms its pre-*Misco* argument to this Court that Petitioner imagines a conflict which is not acknowledged by any court of appeals. Respondent appends its Brief in Opposition on Petition for Writ of Certiorari, *United Paperworkers' Int'l Union v. S.D. Warren Co.*, No. 87-583 (Nov. 10, 1987). *See* Resp. App. B, pp. 2a-20a.

United Inter-Mountain Tel. Co. v. Communications Workers, 845 F.2d 327 (6th Cir. 1988), *aff'g* 662 F. Supp. 82 (E.D. Tenn. 1987), *petition for cert. filed*, (No. 87-5701) (Sept. 18, 1988). Since Petitioner claims that both *United Inter-Mountain* and *S.D. Warren* are wrongly decided, *see* Brief for Petitioner at 23 n.13, on the basis of Petitioner's own brief, it would appear that no post-*Misco* split exists.

Petitioner fails to identify a post-*Misco* split for the simple reason that none exists. Six circuits have yet to decide, in light of *Misco*, whether an arbitral award draws its essence from a collective bargaining agreement.[4] The remaining seven circuits have followed *Misco*, and all have upheld arbitral awards out of deference to the possibility that the arbitrator was construing or applying the

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[4] There are no opinions citing *Misco* by the Fifth, Seventh and District of Columbia Circuits. The only Third Circuit opinion citing *Misco* upheld an arbitral award under *Misco's* public policy strand. *See United States Postal Serv. v. National Ass'n of Letter Carriers*, 839 F.2d 146, 149-50 (3d Cir. 1988). The only Tenth Circuit opinion citing *Misco* upheld an arbitral award where there was no collective bargaining agreement. *See Jenkins v. Prudential-Bache Sec., Inc.*, 847 F.2d 631, 635 (10th Cir. 1988). The Federal Circuit has cited *Misco* only once, and then only to explain that in *Misco* this Court did not address whether deference was due arbitration awards not the subject of appeal. *See Horner v. Schuck*, 843 F.2d 1368, 1377-78 (Fed. Cir. 1988).

collective bargaining agreement.[5] Only the First, Second and Eleventh Circuits have cited *Misco* in published opinions vacating an arbitral award for failure to draw its essence from a collective bargaining agreement.[6] The Second Circuit was confronted with an arbitral award which

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[5] *See Berklee College of Music v. Berklee Chapter of the Mass. Fed'n of Teachers*, No. 88-1073, slip op. at 8 (1st Cir. Sept. 27, 1988); *Bayamon Can Co. v. Congreso de Uniones Industriales*, 843 F.2d 65 (1st Cir. 1988); *Synergy Gas Co. v. Sasso*, 853 F.2d 59 (2d Cir. 1988); *Holcomb v. Colony Bay Coal Co.*, 852 F.2d 792 (4th Cir. 1988); *Borman's, Inc. v. United Food Workers Int'l Union, Local 876*, Nos. 87-1909, 87-1948 (6th Cir. Oct. 7, 1988)(LEXIS, Genfed library, USApp file) (not recommended for publication); *General Foods Corp. v. United Cereal Workers*, No. 87-1649 (6th Cir. June 1, 1988) (LEXIS, Genfed library, USApp file) (not recommended for publication); *Daniel Constr. Co. v. Local 257, Int'l Bhd. of Elec. Workers*, 856 F.2d 1174 (8th Cir. 1988); *United Paperworkers Int'l Union v. Georgia-Pacific Corp.*, 841 F.2d 243 (8th Cir. 1988); *Pullman Power Prod. Corp. v. Local 403, United Ass'n of Journeymen & Apprentices of the Plumbing & Pipefitting Indus.*, 856 F.2d 1211 (9th Cir. 1988) (opinion on rehearing); *Florida Power Corp. v. International Bhd. of Elec. Workers*, 847 F.2d 680 (11th Cir. 1988).

[6] In an opinion not citing *Misco*, filed only eighteen days after this Court decided *Misco*, not recommended for publication and not reported, the Sixth Circuit vacated an arbitral award because the arbitrator had exceeded the scope of his authority under the collective bargaining agreement. *Highlands Hosp. Corp. v. District 1199 WV/KY/OH Nat'l Union of Hosp. Employees*, No. 86-6227 (6th Cir. Dec. 18, 1987) (LEXIS, Genfed library, USApp file). Despite the collective bargaining agreement's express reservation to the hospital of the sole right to discipline an employee once just cause was found, after determining that there was just cause for discipline, the arbitrator in *Highlands Hospital* independently evaluated the hospital's

(Continued on following page)

did not purport to rely upon any express or implied contract term, or upon bargaining history, industrial custom or past practice, and, indeed, which did not contain even an explanation of the arbitrator's reasoning. *In re Marine Pollution Serv., Inc.*, 857 F.2d 91, 95-96 (2d Cir. 1988). The Eleventh Circuit vacated an arbitral award

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(Continued from previous page)

choice of remedy. *Id.* Although the *Highlands Hospital* majority did not cite *Misco*, neither the majority opinion nor subsequent Sixth Circuit decisions depart from *Misco*. In two more recent decisions, the Sixth Circuit has cited *Misco*, deferred to the arbitrator, and enforced the arbitral award. *See Borman's, Inc. v. United Food Workers Int'l Union, Local 876*, Nos. 87-1909, 87-1948 (6th Cir. Oct. 7, 1988) (LEXIS, Genfed library, USApp file) (not recommended for publication); *General Foods Corp. v. United Cereal Workers*, No. 87-1649 (6th Cir. June 1, 1988) (LEXIS, Genfed library, USApp file) (not recommended for publication). *Cf. United Elec. Workers v. G & C Foundry Co.*, No. 87-3232 (6th Cir. Jan. 26, 1988) (LEXIS, Genfed library, USApp file) (not recommended for publication) (enforcing arbitrator's precondition for reinstatement by requiring satisfactory certification of fitness to return to work).

Under its local Rule 24, the Sixth Circuit may control publication and limit citation of its opinions. The rationale for the limited-publication rules in the Sixth and other circuits is to reduce the unnecessary proliferation of published opinions serving no jurisprudential purpose. *See* 6th Cir. R. 24(a)(1); *Furman v. United States*, 720 F.2d 263, 265 & n.1 (2d Cir. 1983). Respondent is uncertain whether it is proper even to cite to Sixth Circuit opinions not recommended for publication and available only by computerized research service, but feels obligated to disclose possibly relevant authority of which it has become aware. It seems obvious, however, that decisions regarded by the Sixth Circuit as lacking sufficient jurisprudential import for publication cannot appropriately serve as a basis for certiorari.

which created and imposed a new policy in direct conflict with an express provision of the collective bargaining agreement specifically reserving exclusive authority over the policy to the employer. *Bruno's, Inc. v. United Food Workers Int'l Union, Local 1657*, No. 87-7743 (11th Cir. Oct. 31, 1988) (LEXIS, Genfed library, USApp file).[7]

The First Circuit has applied *Misco* three times: once in *Bayamon Can Co. v. Congreso de Uniones Industriales*, 843 F.2d 65 (1st Cir. 1988), once in these two *S.D. Warren* actions, and once in *Berklee College of Music v. Berklee Chapter of the Mass. Fed'n of Teachers*, No. 88-1073, slip op. (1st Cir. Sept. 27, 1988).[8] Less than three weeks before deciding *S.D. Warren* III, the First Circuit reversed the United States District Court for the District of Puerto Rico and, citing *Misco*, upheld an arbitrator's award because it was arguably within the language of the collective bargaining agreement. *Bayamon Can*, 843 F.2d at 66-67. More recently, in *Berklee College of Music*, the First Circuit enforced another arbitral award because of the limited

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[7] *Cf. United States Postal Serv. v. National Ass'n of Letter Carriers*, 847 F.2d 775, 777-79 (11th Cir. 1988) (citing *Misco* for its public policy holding, but vacating an arbitral award on the alternative grounds that reinstatement of a postal employee convicted of mail theft was arbitrary and capricious because of the arbitrator's erroneous application of due process principles).

[8] In the only other First Circuit opinion citing *Misco*, the court of appeals noted that "pursuant to national . . . labor policies, arbitration awards enjoy a higher degree of deference than court judgments." *Estrada-Izquierdo v. Aponte-Roque*, 850 F.2d 10, 19 n.9 (1st Cir. 1988).

scope of judicial review under *Misco*. Far from acknowledging any supposed split, the First Circuit has explained what distinguishes *S.D. Warren* in *Berklee College of Music:*

> In *S.D. Warren,* the contract said that management had the 'sole right' to dismiss a person who violated Mill Rule 7, and the arbitrator found that the employees had violated Mill Rule 7. We could not think of a way to express more clearly than through the use of the words 'sole right' the fact that it was up to management, not the arbitrator, to decide whether or not to dismiss the employee.

Berklee College of Music, No. 88-1073, slip op. at 7-8. Indeed, Petitioner and *Berklee College of Music* use nearly identical language to interpret *Misco,* the First Circuit observing that *Misco* "has reiterated, in language stronger than previously used, that matters of contract interpretation are typically up to the arbitrator, not the courts." *Id.* at 3.

Since Petitioner fails to show any "deep division" among the circuits after *Misco,* in essence, Petitioner asks this Court to grant certiorari because the two post-*Misco* decisions it cites are claimed to be wrongly decided. *See* Brief for Petitioner at 23 n.13.

B. Certiorari should be denied for the simple reason that *S.D. Warren* is correct. *S.D. Warren* follows *Misco, AT&T,* and the *Steelworkers* principles these decisions

have so recently reemphasized.[9] Nothing in *S.D. Warren* suggests that the First Circuit disagrees with *Misco*. On the contrary, the First Circuit abandoned its public policy rationale in light of *Misco*, and carefully distinguished the facts in *S.D. Warren* from those which were before this Court. In *S.D. Warren*, unlike *Misco*, the arbitrators found that the discharged employees had violated the workplace drug and alcohol rule. Moreover, in *S.D. Warren*, unlike *Misco*, the parties had negotiated, incorporated into the collective bargaining agreement, and put before the arbitrators a specification of disciplinary rules and resulting penalties which left nothing to the arbitrators

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[9] *Misco* explicitly acknowledges that under *AT&T*, 475 U.S. at 649-50, it is for the courts to enforce limitations on the scope of arbitral authority for which the parties have bargained. In *Misco*, this Court observed that judicial deference is due an arbitral award "as long as the arbitrator is even arguably construing or applying the contract *and acting within the scope of his authority.*" *Misco*, 108 S. Ct. at 371 (emphasis added). Under *AT&T* and *Misco*, courts are not authorized to reconsider the merits of an arbitral award, and arbitrators are not authorized to usurp the "unreviewable discretion of management" reserved under a collective bargaining agreement. *Id.* at 372. *See United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567-78 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). Hence, Petitioner errs in assuming federal courts owe any particular deference to the arbitrators' determinations that it was within the scope of their authority to review S.D. Warren's decision to discharge its employees once the arbitrators found that the employees had violated the workplace drug and alcohol rule. *See AT&T*, 475 U.S. at 651 (quoting Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1509 (1959)). *See also John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-47 (1964) (quoting *Atkinson v. St. Clair Refining Co.*, 370 U.S. 238, 241 (1962)).

except to determine whether a violation occurred. As the First Circuit explained, *S.D. Warren* came under the exception envisioned in *Misco* when this Court observed that it might be "within the unreviewable discretion of management to discharge an employee once a violation of [the] Rule was found." *Misco*, 108 S. Ct. at 372.

C. Even assuming, *arguendo*, there is some post-*Misco* division among the circuits sufficient to justify certiorari, or that *S.D. Warren* marked a significant departure from *Misco*, this Court should deny certiorari in *S.D. Warren* because the question presented by Petitioner cannot be decided on this record. The arbitrators below did not interpret a provision in the collective bargaining agreement by reference to a past practice under that provision. The record is inadequate to establish any past practice regarding discipline for violation of the workplace drug and alcohol rule, and the question of appropriate discipline under the rule appears to have been one of first impression.[10]

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[10] In a somewhat confusing discussion, Arbitrator Gwiazda mentions two "apparent" violations of the workplace drug and alcohol rule, but recognizes that these were also simultaneous violations of last chance agreements under S.D. Warren's Employee Assistance Program. Regarding violations of the workplace rule by possession of illegal drugs, the Arbitrator observed that "no penalty had ever been imposed before – leaving the whole matter a big question mark." Pet. App. E, p. 84a.

Arbitrator Role recognized that the grievants before him were the first ever to be disciplined for violations of the workplace drug and alcohol rule. *See* Pet. App. H, pp. 188a, 194a.

CONCLUSION

Petitioner and Respondent agree that "[a]ny doubt as to the meaning of the *Trilogy* with respect to the scope of judicial authority to enforce a court's understanding of the 'express language' of a collective bargaining agreement should have been laid to rest . . . by this Court's decision in *Misco*." Brief for Petitioner at 20. No circuit court has questioned the accuracy of this proposition. No circuit court has suggested that it perceives any split among *any* of the circuits. Indeed, six circuits have had no opportunity even to apply the relevant *Steelworkers* principles reemphasized in *Misco*.

For these reasons, review of these decisions would not represent a timely or efficient use of this Court's discretionary power of review. The petition for a writ of certiorari should be denied.

DATED: November 16, 1988

Respectfully submitted,

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APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

September 29, 1988

S. Mason Pratt, Jr., Esquire
Pierce, Atwood, Scribner, Allen,
Smith & Lancaster
One Monument Square
Portland, ME 04101

Re: *United Paperworkers' International Union, AFL-CIO, Local No. 1069 v. S.D. Warren Company, etc., No. 88-462*

Dear Mr. Pratt:

Your request of September 28, 1988, for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari in the above-entitled case has been granted, and your time has been extended to and including November 18, 1988.

Very truly yours,

JOSEPH F. SPANIOL, JR.,
Clerk

By

/s/
Francis J. Lorson
Chief Deputy Clerk

kb
cc: Mark Brooks, Esq.

APPENDIX B

No. 87-583

In The

Supreme Court of the United States

October Term, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,

Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

S. MASON PRATT, JR.
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November 10, 1987

QUESTION PRESENTED

Does a federal court have the power to vacate an arbitral award which disregards unambiguous collective bargaining agreement language and substitutes therefor the arbitrator's own brand of industrial justice?

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RULE

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No. 87-583

In The

Supreme Court of the United States

October Term, 1987

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,

Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,[1]

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[1] In satisfaction of the requirements of United States Supreme Court Rule 28.1, Scott Paper Company has the following subsidiaries and affiliates (except wholly-owned subsidiaries): Scott Iberica, S.A.; Taiwan Scott Paper Corporation; Cellulosa Jujuy, S.A.; Compania Industrial de San Cristobal, S.A.; COPA-Companhia de Papeis; Sanyo Scott Company Limited; Scott Paper Company de Costa Rica, S.A.; Scott Paper

(Continued on following page)

STATEMENT OF THE CASE

This case hinges upon the construction of a certain collective bargaining agreement between the parties governing the production employees at Respondent's (hereinafter sometimes referred to as the "Company") paper mill in Westbrook, Maine. After three mill employees were discharged for violation of a specific contract rule, Rule 7(A), prohibiting possession, use or sale of illegal drugs on the mill premises, Petitioner (hereinafter sometimes referred to as the "Union") filed grievances on behalf of the discharged employees. The grievances ultimately were submitted to arbitration.[2]

The bargaining agreement provides that the Company has "the sole right to . . . discharge . . . for proper cause." Petitioner's Appendix (hereinafter "App.") 43a. It further provides that violation of Rule 7(A) "is considered cause for discharge." The arbitrator found that the

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(Continued from previous page)

Limited; Scott Trading Limited; Ssangyong Paper Co., Ltd.; Thai-Scott Paper Company; Brunswick Pulp Land Company, (partnership); Canso Chemicals Limited; Mountain Tree Farm Company.

[2] In fact, twelve employees were simultaneously discharged for violation of Rule 7(A). The grievances involved herein, together with the grievance of Marshall Buhelt, were consolidated with a fifth grievance filed on behalf of Roland Villacci and assigned to Arbitrator Suzanne Gwiazda. Prior to hearing, the Union voluntarily dismissed the Villacci grievance. Arbitrator Gwiazda upheld the discharge of Mr. Buhelt. Five other grievances were consolidated and assigned to Arbitrator Theodore Role, whose award is the subject of another related and pending proceeding. The Union never filed grievances on behalf of the remaining two discharged employees.

three grievants, in fact, violated Rule 7(A) and acknowledged that such violations were dischargeable offenses. She nevertheless ordered the employees reinstated because she found Rule 7(A) ambiguous in that its heading, "Causes for Discharge," contains no verb and in that it fails to state that violations unequivocally "will be" cause for discharge. App. 66a-67a. The arbitrator also observed that, under the contract, the Company "chose to retain discretion over such decisions" regarding discipline for violation of Rule 7(A). App. 67a.

The arbitrator then reasoned that the Company's retention of discretion over discipline somehow "allowed a third party neutral [i.e., the arbitrator] the same discretion when reviewing the propriety of those [disciplinary] decisions." App. 67a. *See also* App. 87a. In other words, because the Company made certain at the bargaining table to retain for itself the "sole right" to decide to discharge for proper cause, it also subjected such discretionary decisions to arbitral review.

The arbitrator, therefore, reviewed *de novo* the "fairness" of the Rule 7(A) discharge decisions by weighing various "mitigating circumstances."[3] Despite her finding that there was no past practice with respect to possession,

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[3] For example, in determining the "fair" penalty for Linda Willoughby, the arbitrator specifically took into account her seniority, work record, difficult working conditions, initial resistance to the undercover agent and possession of marijuana for post-work enjoyment. App. 92a. "Balancing the seriousness of drug possession against the many mitigating factors in Ms. Willoughby's case," the arbitrator "conclude[d] that the fair penalty is a four-month suspension." App. 93a.

use or sale of drugs on mill premises, App. 74a, she also examined the relative severity of discipline imposed for other unrelated employee misconduct. *See, e.g.*, App. 68a-69a. She found that although the grievants' "drug activity in the workplace must be viewed as very serious misconduct," App. 84a, "as a matter of equity," discharge was an excessively harsh punishment for such misconduct. *See* App. 84a, 87a, 89a, 92a.

The United States District Court for the District of Maine confirmed the arbitrator's award reinstating the discharged employees. The United States Court of Appeals for the First Circuit reversed the district court decision, holding that the arbitrator exceeded her authority by substituting her extra-contractual view of fairness and equity for the Company's collectively bargained right to discharge employees who use, possess or sell drugs at work. App. 14a-15a. The First Circuit also held that the arbitrator's award violated the dominant and well-defined public policy against drugs in the workplace. App. 18a.

The question for this Court is whether this case involving the construction of the parties' contract presents an issue with respect to which there is a direct and important conflict of the circuit courts of appeals which requires Supreme Court resolution, presents such an important constitutional or statutory question as to warrant review or, for any other reason, demands this Court's attention.

REASONS FOR DENYING THE WRIT

A. THERE IS NO CONFLICT AMONG CIRCUITS.

The First Circuit decision is in accord with, and expressly relied on, decisions in the Sixth and Tenth Circuits. *See Morgan Services, Inc. v. Local 323, Chicago & Central States Joint Board,* 724 F.2d 1217 (6th Cir. 1984); *Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.,* 630 F.2d 474 (6th Cir. 1980); *Mistletoe Express Service v. Motor Expressmen's Union,* 566 F.2d 692 (10th Cir. 1977). The First Circuit also relied on the Fourth Circuit decision in *Textile Workers Union, Local 1386 v. American Thread Co.,* 291 F.2d 894 (4th Cir. 1961). App. 13a-14a.

Petitioner maintains, however, that the decisions of the Third, Fifth, Seventh and Eighth Circuits stand "in stark contrast" to, and are in direct conflict with, the decisions of the First, Sixth, Tenth and, presumably, Fourth Circuits. This simply is not the case. *Not one* of the Third, Fifth, Seventh and Eighth Circuit decisions cited by Petitioner contains any statement rejecting or even mildly criticizing, the Sixth and Tenth Circuit decisions with which they allegedly conflict; nor do they acknowledge the existence of the conflict suggested by the Union.

Indeed, the Third Circuit, far from rejecting the Sixth and Tenth Circuits' decisions, has expressly approved them. In *Kane Gas Light & Heating Co. v. Int'l Bhd. of Firemen & Oilers, Local 112,* 687 F.2d 673 (3d Cir. 1982), *cert. denied,* 460 U.S. 1011 (1983) (upholding award reinstating employee discharged for insubordination on ground that arbitrator found that discharged employee

was not, in fact, insubordinate), the Third Circuit distinguished and expressly approved the Sixth Circuit's decision in *Int'l Bhd. of Firemen & Oilers, Local 935-B v. Nestle Co.*, 630 F.2d 474:

> *Nestle*, however, merely stands for the proposition – *with which we fully agree* – that an arbitrator's decision should be vacated when the arbitrator finds facts that constitute grounds for discharge under the collective bargaining agreement, but, in disregard of those facts and the terms of the agreement, refuses to uphold the discharge.

687 F.2d at 680 (emphasis supplied). The court also specifically cited with approval the Tenth Circuit's decision in *Int'l Union of Operating Eng'rs, Local 670 v. Kerr-McGee Refining Corp.*, 618 F.2d 657 (10th Cir. 1980) (following *Mistletoe*, court vacated award wherein arbitrator ignored provisions in agreement making the giving of false statements to obtain sick leave grounds for discharge). *Id.; see also H. K. Porter Co. v. United Saw, File & Steel Products Workers*, 333 F.2d 596, 602 (3d Cir. 1964) ("[a]rbitrator was unjustified in deviating from the plain mandate" of contract).

Thus, the Third Circuit's approach to the question presented herein clearly does not conflict with the Sixth or Tenth Circuits' decisions relied on by the First Circuit below. And yet the Third Circuit is one of the circuits upon which Petitioner principally relies to illustrate the existence of a conflict worthy of this Court's attention.

The Fifth, Seventh and Eighth Circuits also agree with the premise underlying the First Circuit's decision,

namely, that an arbitrator may interpret ambiguous language but may not disregard or modify plain and unambiguous contract language. App. 18a. For example, the Seventh Circuit has cited approvingly the Sixth Circuit decision in *Morgan Services*, 724 F.2d 1217, 1222-24, for the proposition that "the arbitrator may not modify the contract unless authorized to do so." *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 186 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986); *see also Young Radiator Co. v. Int'l Union, U.A.W.*, 734 F.2d 321, 325 (7th Cir. 1984) (where contract gave employer right to discharge for theft, arbitrator's decision that discharge was proper only if theft was "motivating cause" for discharge did not draw its essence from contract); *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 807 F.2d 1416, 1421 (8th Cir. 1986), *reh. denied*, 817 F.2d 1333 (8th Cir. 1987) (*citing with approval* Tenth Circuit decision in *Kerr-McGee* and Sixth Circuit decision in *Detroit Coil Co. v. I.A.M.*, 594 F.2d 575 (1979)); *St. Louis Theatrical Co. v. St. Louis Theatrical Bhd., Local 6*, 715 F.2d 405, 409 (8th Cir. 1983) (arbitrator exceeded authority by balancing equities of company's discipline where "agreement [was] not susceptible to a construction beyond its plain meaning"); *Truck Drivers & Helpers Union, Local 784 v. Ulry-Talbert Co.*, 330 F.2d 562, 566 (8th Cir. 1964) (where clear intendment of contract was that, in event of discharge, arbitrator would not substitute his judgment for that of employer, arbitrator exceeded authority by reducing penalty after finding employee guilty of acts charged); *Teamsters, Local 657 v. Stanley Structures, Inc.*, 735 F.2d 903, 905 (5th Cir. 1984) ("arbitrator may not disregard or modify plain and unambiguous provisions of the agreement") (*citing with approval Storer*

Broadcasting Co. v. Am. Fed'n of Television & Radio Artists, 600 F.2d 45, 47 (6th Cir. 1979), *cert. denied*, 454 U.S. 1099 (1981)).

In short, there is no conflict among the circuit courts of appeals on the fundamental point that an arbitrator may not refuse to uphold, on fairness grounds, the discharge of an employee once the arbitrator finds facts clearly constituting grounds for discharge under the bargaining agreement. Because the First Circuit did no more than apply this elemental principle, the petition should be denied.

B. THIS CASE RAISES NO IMPORTANT QUESTION OF FEDERAL LAW.

The First Circuit's holding that the arbitrator exceeded her authority by entering the domain of the propriety of the penalty raises no important question of federal law. Rather, the court merely followed the doctrines of the *Steelworkers Trilogy* and applied them to the particular facts at hand.

The First Circuit premised its decision on the well-established principle that, although arbitrators are to be given great latitude in interpreting collective bargaining agreements, judicial deference to arbitral awards is not absolute. *See AT & T Technologies, Inc. v. Communication Workers*, 475 U.S. 643, ___, 106 S. Ct. 1415, 1418 (1986) (whether bargaining agreement creates duty to arbitrate a particular question is "undeniably an issue for judicial determination"). Specifically, arbitrators may not dispense their own brand of industrial justice but are confined to the interpretation and application of the parties' bargaining agreement; "all arbitration awards must draw

their essence from the collective bargaining agreement." App. 5a, *citing United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). By ignoring such provisions and substituting her own view of the appropriate penalty for that of the Company, the arbitrator exceeded her authority, and her award failed to draw its essence from the bargaining agreement.

It is clear, under the *Steelworkers Trilogy*, that an award does not "draw its essence from" a contract when such an award abandons the contract in favor of the arbitrator's own agenda for industrial justice. *Enterprise Wheel & Car*, 363 U.S. at 597. Far from undermining the *Steelworkers Trilogy*, the First Circuit decision simply applies its teachings. Thus, neither this case nor any other First Circuit decision[4] threatens or even questions the important principles set forth in the *Steelworkers Trilogy*. On the contrary, applying an extremely deferential standard of review to arbitral awards, it has consistently enforced the awards of arbitrators who have confined

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[4] *See, e.g., Posadas de Puerto Rico Assoc., Inc. v. Asociacion de Empleados de Casino de Puerto Rico*, 821 F.2d 60, 61 (1st Cir. 1987) (lamenting the "exasperating frequency" with which meritless challenges to arbitral awards are brought, court awarded double costs to appellee); *Bechtel Constr., Inc. v. Laborers' Int'l Union*, 812 F.2d 750 (1st Cir. 1987); *Intl Bhd. of Firemen & Oilers, Local 261 v. Great Northern Paper Co.*, 765 F.2d 295 (1st Cir. 1985); *Trustees of Boston Univ. v. Boston Univ. Chapter, Am. Ass'n of Univ. Professors*, 746 F.2d 924 (1st Cir. 1984).

themselves to the interpretation and application of the bargaining agreement.[5]

Of course, different cases applying the *Steelworkers Trilogy* necessarily produce varying results both among the circuits and within each circuit. These differences, however, are caused, not by any fundamental disagreement as to the standard of judicial review of arbitral awards, but by factual differences, such as differences in the particular contracts involved and in arbitral factual findings as to whether the employee engaged in the misconduct alleged. *Compare, e.g., Fabricut, Inc. v. Tulsa General Drivers, Warehousemen & Helpers, Local 523*, 597 F.2d 227 (10th Cir. 1979) *and Industrial Mutual Ass'n v. Amalgamated Workers, Local 383*, 725 F.2d 406 (6th Cir. 1984) *with Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977) *and Local 342, U.A.W. v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 395 U.S. 910 (1969).

Thus, the question in any given case is whether a court was correct in concluding, based on the facts before it, that the award did or did not draw its essence from the contract. That each case necessarily turns on the specific

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[5] Furthermore, Petitioner is inaccurate in its attempt to show the Court that there is a growing trend at the federal appellate level to overturn or vacate arbitral awards. Contrary to footnote 10 on page 19 of the Petition for Writ of Certiorari, among labor arbitration cases decided by the circuit courts of appeals, there has been, in fact, a significant *decline* in the percentage of arbitral awards being overturned: our reading of the confusing source relied on by Petitioner reflected a 37.8% vacate rate from 1971-1975 but only a 26.1% vacate rate from 1981-1985.

agreement and factual findings involved would explain why this Court has routinely declined to review such cases, regardless of whether the arbitral award, in the particular case, was confirmed or vacated.[6]

This case, too, turns on the specific agreement negotiated by the local unit of production workers and the Company, as well as on the arbitrator's findings that the grievants were guilty of the acts alleged and that, *under the contract*, the Company reserved the discretion to discharge for such acts. Under the terms of that agreement, the parties removed from arbitral consideration the question of the appropriate or just penalty for possessing, selling or using marijuana on mill property. The arbitrator's conclusion that she was free to assess the equities of

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[6] *See, e.g., Teamsters, Local 863 v. Jersey Coast Egg Producers*, 773 F.2d 530 (3d Cir. 1985), *cert. denied*, 106 S. Ct. 1468 (1986); *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180 (7th Cir. 1985), *cert. denied*, 106 S. Ct. 1184 (1986); *Manhattan Coffee Co. v. Int'l Bhd. of Teamsters, Local 688*, 743 F.2d 621 (8th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985); *Super Tire Eng. Co. v. Teamsters Local 676*, 721 F.2d 121 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984); *Sears, Roebuck & Co. v. Teamsters, Local 243*, 683 F.2d 154 (6th Cir. 1982), *cert. denied* 460 U.S. 1023 (1983); *Arco Polymers, Inc. v. Local 8-74*, 671 F.2d 752 (3d Cir.), *cert. denied*, 459 U.S. 828 (1982); *F.W. Woolworth Co. v. Miscellaneous Warehousemen's Union*, 629 F.2d 1204 (7th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981); *Storer Broadcasting Co. v. Am. Fed'n of Television & Radio Artists*, 600 F.2d 45 (6th Cir. 1979), *cert. denied*, 454 U.S. 1099 (1981); *Detroit Coil Co. v. Int'l Ass'n of Mach. & Aerosp. Workers*, 594 F.2d 575 (6th Cir.), *cert. denied*, 444 U.S. 840 (1979); *Amoco Oil Co. v. Oil, Chemical & Atomic Workers Int'l Union*, 548 F.2d 1288 (7th Cir.), *cert. denied*, 431 U.S. 905 (1977); *Local 342, U.A.W. v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir. 1968), *cert. denied*, 345 U.S. 910 (1969).

the discharge decisions simply was not based on, and did not draw its essence from, the contract.

In sum, the decision below presents no issues demanding the attention of this Court. This case involves no important constitutional issue or undecided statutory issue. Instead, the case reflects the First Circuit's application of the long-standing teaching that a federal court must refuse enforcement of an award by an arbitrator who does not "confine [herself] to interpretation and application of the collective bargaining agreement." *Enterprise Wheel & Car,* 363 U.S. 593, 597 (1960).

C. THE PENDING *MISCO* CASE IS NOT A REASON TO GRANT CERTIORARI IN THIS CASE.

As Petitioner notes, one reason the First Circuit reversed the district court decision was that the arbitrator's award violated the public policy against drugs in the workplace. This Court has this term granted certiorari and heard oral argument in a case involving nearly identical facts and issues of public policy. *Misco, Inc. v. United Paperworkers Int'l Union,* 768 F.2d 739 (5th Cir. 1985), *cert. granted,* 107 S. Ct. 871 (1986) (No. 86-651). The pendency of the *Misco* decision suggests, if anything, the propriety of this Court postponing a decision to grant certiorari on the public policy question until it renders a decision in the *Misco* case.

If this Court affirms the Fifth Circuit decision, there will be no need for the Court to review the instant case because one of the gounds on which the circuit decision rests shall already have been sustained by the Court. Moreover, even if this Court reverses the Fifth Circuit's

Misco decision, there is no reason to review this case because, as demonstrated above, the other ground upon which the First Circuit reversed the district court decision presents no important question of federal law or conflict with the other circuit courts of appeals, but rather, merely reflects proper application of a universally accepted principle of labor law to a specific labor agreement.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit be denied.

DATED: November 10, 1987

Respectfully submitted,

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(Counsel of Record)
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Supreme Court, U.S.
FILED
DEC 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-462

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

UNITED PAPERWORKERS INTERNATIONAL UNION,
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Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF
SCOTT PAPER COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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Paperworkers v. Misco, —— U.S. ——, 56 L.W. 4011 (Dec. 1, 1987) ..... *passim*
Sears, Roebuck & Co. v. Teamsters Local 243, 683 F.2d 154 (6th Cir. 1982) 5
Steelworkers v. Warrior & Gulf Co., 363 U.S. 574 (1960) 6, 7
Timken Co. v. Steelworkers, 492 F.2d 1178 (6th Cir. 1974) 4-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-462

UNITED PAPERWORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL NO. 1069,
Petitioner,

v.

S.D. WARREN COMPANY, A DIVISION OF SCOTT PAPER COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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REPLY BRIEF FOR PETITIONER

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1. Respondent does not confront the basic point of our petition: that there is a deep, longstanding conflict regarding the scope of judicial review of labor arbitration awards between the decision below (and like decisions of the Sixth and Tenth Circuits) and the decisions we cited of the Third, Fifth, Seventh and Eighth Circuits. Rather it is respondent's position that because this conflict predates this Court's decision in *Paperworkers v. Misco,*

—— U.S. ——, 56 L.W. 4011 (Dec. 1, 1987), review by this Court at this time would be "premature," Resp. Br. at 8. That evasion avails Respondent nothing.

Misco teaches that

> as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision. [56 L.W. 4014]

Thus, as even the First Circuit has acknowledged, *Misco* "reaffirm[s] *in language stronger than previously used,* that matters of contract interpretation are typically up to the arbitrator," *Berklee College of Music v. Berklee Chapter of the Mass. Federation of Teachers,* 858 F.2d 31, 32 (1st Cir. 1988) (emphasis added).

Nonetheless, the decision below indicates that those courts which have adopted an expansive view of the scope of judicial authority to review arbitral awards will not be daunted by *Misco.* The First Circuit, after *Misco,* will continue to examine labor agreements for itself to "see if the contract [i]s ambiguous," Pet. App. 24a, and that court will overturn arbitral awards where "[w]e disagree that [the contract] [i]s . . . ambiguous," Pet. App. 17a. Thus it is the First Circuit's view that the authority of labor arbitrations is confined to construing collective bargaining agreements that a *court* regards as ambiguous; where an arbitral award is inconsistent with the court's understanding of "the contract's unambiguous language," says the First Circuit, it cannot be said that the arbitrator even "arguably construe[ed] or appl[ied] the contract." Pet. App. 11a.

The Sixth Circuit, post-*Misco,* has followed the same path as the decision below. In *Highlands Hospital Corp. v. District 1199,* C.A. No. 86-6227 (Dec. 18, 1987), the Sixth Circuit overturned an arbitrator's ruling that an employee who had failed to comply with "the highest

standards of professional competence" was discharged without just cause. The court concluded that because the contract left it to the employer to decide upon the punishment for violations of professional standards, the contract "unambiguously" permitted discharge even where, as the arbitrator had found, the employer's violation was not the true basis for the disciplinary action. The Sixth Circuit thus rejected the arbitrator's interpretation that the "professional standards" clause of the contract applied only to discharges motivated by a breach of such standards. *See also Communications Workers v. United Inter-Mountain Telephone Co.*, C.A. No. 87-5701 (April 25, 1988), *petition for cert. filed*, No. 88-463.[1]

The theory of judicial review of arbitral awards reaffirmed in the decision below and in *Highlands Hospital*, is, to put it most gently, difficult to reconcile with *Misco*'s holding and rationale. Thus, there is no real doubt that the conflict which predated *Misco* will continue. *Misco*, as we have seen, emphasizes the broad authority of arbitrators in interpreting collective bargaining agreements. It is, therefore, nothing short of inconceivable that *Misco* will result in more activist review by those appellate courts which over the years quite properly have deferred to arbitral interpretations in so-called "plain language" cases.

2. The respondent in No. 88-463, *Communications Workers of America v. United Inter-Mountain Telephone Co.*, which was filed in tandem with the instant petition, denies the existence of even a pre-*Misco* circuit conflict. Significantly, however, United Inter-Mountain makes no attempt to reconcile the decisions we cited in our petition

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[1] Respondent observes that *Highlands Hospital* was decided "only eighteen days after this Court decided *Misco*" and that "the *Highlands Hospital* majority did not cite *Misco*." Resp. Br. at 10-11 n.6. Respondent neglects to point out, however, that the *dissenting opinion* in *Highlands Hospital* argued that the majority decision was inconsistent with *Misco*, and that the majority was unmoved by the dissent's reliance on *Misco*.

with the decisions below or with the decisions on which the First Circuit relied.

Instead, United Inter-Mountain points to *other* decisions by the Fifth, Seventh and Eighth circuits which are said to be consistent with the decision below (and hence inconsistent with the decision by those courts on which we relied). *See* Resp. Br. in No. 88-463 at 15. And United Inter-Mountain also cites decisions of the Sixth Circuit which are said to be inconsistent with the decision below (and hence with the Sixth Circuit case law on which the First Circuit relied). *See id.* at 13-15.

The decisions United Inter-Mountain cites establish nothing more than that those courts which have adopted an activist standard of review of arbitral awards sometimes uphold such awards under that standard, while those courts which have adopted a deferential standard sometimes overturn arbitral awards notwithstanding the deference afforded arbitrators. Thus, for example, the Sixth Circuit cases United Inter-Mountain cites in no way question or limit that Circuit's rule that an arbitration award fails to draw its essence from the contract whenever

> (1) an award conflicts with express terms of the collective bargaining agreement, (2) an award imposes additional requirements that are not expressly provided in the agreement, (3) an award is without rational support or cannot be rationally derived from the terms of the agreement, and (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement . . . [*Dobbs Inc. v. Local 614, International Brotherhood of Teamsters*, 813 F.2d 85, 86 (6th Cir. 1987).] [2]

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[2] The Sixth Circuit cases United Inter-Mountain cites, while sustaining particular arbitral awards, do so on the ground that "If a collective bargaining agreement is *unclear and ambiguous* in its terms, its construction should normally be determined by the arbitrator," *Timken Co. v. Steelworkers*, 492 F.2d 1178, 1180 (6th

Similarly with the possible exception of *Electrical Workers v. Litton*, 704 F.2d 393, 399-400 (8th Cir. 1983), the cases United Inter-Mountain cites from the other circuits do not depart from those courts' holding that

> [D]espite contrary intimations in [the Sixth Circuit's] decision in *Sears, Roebuck & Co. v. Teamsters Local 243*, 683 F.2d 154, 156 (6th Cir. 1982), there is no rule that an arbitrator in order to find an implied condition, must first find the language of the contract to be ambiguous. Although a literal reading of the contract in this case would preclude the implied condition the arbitrator found, he was not obligated to read the contract literally. [*Ethyl Corp. v. Steelworkers*, 768 F.2d 780, 186 (7th Cir. 1985).] [3]

Moreover, even if United Inter-Mountain were correct in claiming that the Sixth Circuit occasionally has deviated from the rule set out in *Dobbs* or that the Third, Seventh and Eighth Circuits have deviated from the rule of *Ethyl Corp.*, it would follow that the disarray among the courts of appeals is even *more* profound than we have claimed and that within any given circuit decisions vary based on the identity of the panel reviewing an arbitral

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Cir. 1974) (emphasis added), *cited in* Br. for Resp. in No. 88-463 at 13-15. Moreover, United Inter-Mountain's selection of Sixth Circuit cases reaffirm that "the corollary is also true; an arbitrator is bound by the plain and unambiguous provisions of an agreement," as those provisions are interpreted by the court, *see Ford Motor Co. v. Plant Protection Ass'n*, 776 F.2d 69, 74 (6th Cir. 1985); *see also Industrial Mutual Ass'n v. Amalgamated Workers*, 725 F.2d 406, 410 (6th Cir. 1984) (distinguishing cases in which "the arbitrator ignored clear and unambiguous language").

[3] It is also worth noting that none of the cases United Inter-Mountain cites involves the precise issue posed in all of the cases discussed in our petition, *viz.*, whether a provision in a collective bargaining agreement defining certain conduct as "dischargeable" necessarily grants the employer unfettered and unreviewable discretion to decide whether to discharge an employee who has engaged in such conduct. Thus, Inter-Mountain's cases do not detract from our showing of a 4-3 circuit conflict on this important and recurring issue.

award. Thus, *Inter-Mountain*'s showing of intra-circuit conflicts, if credited, would *add to* rather than detract from the reasons for granting a writ of certiorari in this case.

3. In our petition we suggested that, in light of *Misco*, this case may be an appropriate one for summary reversal. Respondent's attempt to defend the decisions below on the merits adds force to that suggestion.

According to the respondent, the decisions below proceed from the premise that just as the courts are to determine *whether* a grievance is arbitrable, *see Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960), so, too, "it is for the courts to enforce limitations on the scope of arbitral authority" with respect to grievances the parties have indisputably agreed to submit to arbitration. Resp. Br. at 14 n.9. From that premise respondent contends that "*Petitioner errs in assuming federal courts owe any particular deference to the arbitrators' determinations that it was within the scope of their authority to review S.D. Warren's decision to discharge its employees* once the arbitrators found that the employees had violated the workplace drug and alcohol rule." *Id.* (emphasis added). And consistent with that view respondent states that the question posed by the decision below is

> Whether the scope of arbitral authority is unrestricted by the express language of a collective bargaining agreement reserving to management the "sole right . . . to discharge employees for proper cause," and providing that violation of a workplace drug and alcohol rule is "cause for discharge," where an arbitrator finds that employees subject to discipline in fact violated the workplace drug and alcohol rule? [Resp. Br. at i.]

The proposition that the rule of *Warrior & Gulf*—which permits courts to decide whether a dispute is arbitrable—extends to straight questions of contract inter-

pretation is plainly wrong. The very reason for the *Warrior & Gulf* rule is that because the arbitrator has plenary authority to decide such contract questions, *see* 363 U.S. at 581-82, it is appropriate for the courts to assure in the first instance that the parties provided for arbitration. Thus, as the Court stated in *AT&T Technologies v. Communications Workers*, 475 U.S. 643, 651 (1986), "If the Court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration."

Here there is no doubt that the arbitrators had jurisdiction to decide in the *Warrior & Gulf* sense. And, for the reasons we have given, it follows that *Misco* governs and that the decision below should be reversed.

CONCLUSION

For the foregoing reasons, and those stated in our petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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